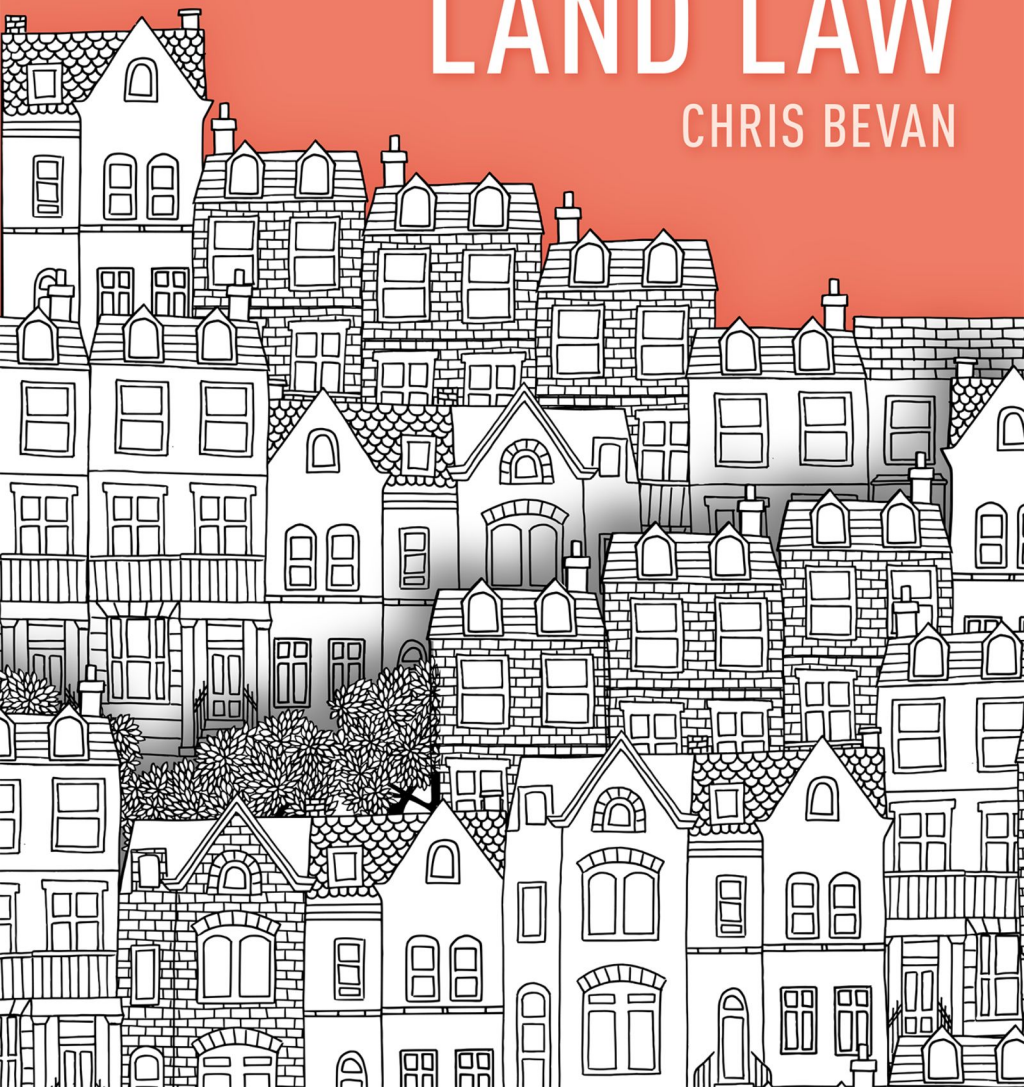


OXFORD

THIRD EDITION

# LAND LAW

CHRIS BEVAN



# Land Law

*Third Edition*

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OXFORD  
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Great Clarendon Street, Oxford, OX2 6DP,  
United Kingdom

Oxford University Press is a department of the University of Oxford.  
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First edition 2018

Second edition 2020

Third edition 2022

Impression: 1

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Published in the United States of America by Oxford University Press  
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data  
Data available

Library of Congress Control Number: 2022932538

ISBN 978-0-19-285676-0

Printed in Great Britain by  
Bell & Bain Ltd., Glasgow

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# Brief Contents

|                                       |            |
|---------------------------------------|------------|
| Preface                               | ix         |
| Acknowledgements                      | xi         |
| New to this Edition                   | xii        |
| Guide to Using this Book              | xiii       |
| Table of Cases                        | xv         |
| Table of Legislation                  | xxxii      |
| <br>                                  |            |
| <b>1 Introduction to Land Law</b>     | <b>1</b>   |
| <b>2 Registered Land</b>              | <b>46</b>  |
| <b>3 Unregistered Land</b>            | <b>125</b> |
| <b>4 Adverse Possession</b>           | <b>146</b> |
| <b>5 Co-ownership</b>                 | <b>186</b> |
| <b>6 Interests in the Family Home</b> | <b>245</b> |
| <b>7 Licences</b>                     | <b>278</b> |
| <b>8 Proprietary Estoppel</b>         | <b>304</b> |
| <b>9 Leases</b>                       | <b>338</b> |
| <b>10 Leasehold Covenants</b>         | <b>386</b> |
| <b>11 Easements and Profits</b>       | <b>429</b> |
| <b>12 Freehold Covenants</b>          | <b>504</b> |
| <b>13 Mortgages</b>                   | <b>544</b> |
| <b>14 Land Law and Human Rights</b>   | <b>601</b> |
| <br>                                  |            |
| Glossary                              | 631        |
| Index                                 | 635        |



# Detailed Contents

|                          |       |
|--------------------------|-------|
| Preface                  | ix    |
| Acknowledgements         | xi    |
| New to this Edition      | xii   |
| Guide to Using this Book | xiii  |
| Table of Cases           | xv    |
| Table of Legislation     | xxxii |

|  |            |
|--|------------|
| <b>1 Introduction to Land Law</b>  | <b>1</b>   |
| 1.1 Introduction   | 1          |
| 1.2 The scope of contemporary land law: What is land law?                      | 3          |
| 1.3 What is land?  | 4          |
| 1.4 The personal/proprietary divide  | 28         |
| 1.5 Tenure, estates, and interests in land                                     | 30         |
| 1.6 The legal/equitable distinction  | 33         |
| 1.7 Introduction to registered and unregistered land                           | 41         |
| 1.8 Bringing it all together: Land law as a puzzle                             | 44         |
| <b>2 Registered Land</b>   | <b>46</b>  |
| 2.1 Introduction   | 46         |
| 2.2 The system of registered land: Aims and objectives                         | 50         |
| 2.3 The Land Registration Act 2002: An overview                                | 55         |
| 2.4 The mechanics of registered land: Titles                                   | 59         |
| 2.5 The mechanics of registered land: Subsequent dealings with registered land | 64         |
| 2.6 The mechanics of registered land: Notices and restrictions                 | 71         |
| 2.7 The mechanics of registered land: Overreaching                             | 80         |
| 2.8 The mechanics of registered land: Unregistered interests that override     | 86         |
| 2.9 The mechanics of registered land: Alteration of the register and indemnity | 108        |
| 2.10 Future directions   | 117        |
| <b>3 Unregistered Land</b>   | <b>125</b> |
| 3.1 Introduction   | 125        |
| 3.2 Unregistered title deeds conveyancing: An overview                         | 125        |
| 3.3 Investigation of title   | 126        |
| 3.4 The enforceability of third party rights in unregistered land              | 127        |
| 3.5 Future directions  | 143        |

|          |   |            |
|----------|---|------------|
| <b>4</b> | <b>Adverse Possession</b>   | <b>146</b> |
| 4.1      | Introduction  | 146        |
| 4.2      | The basis for adverse possession  | 147        |
| 4.3      | Analysing a claim to adverse possession                                     | 150        |
| 4.4      | Stage 1: Establishing a claim to adverse possession: The essential elements | 151        |
| 4.5      | Terminating or interrupting a period of adverse possession                  | 166        |
| 4.6      | Stage 2: The effect of adverse possession                                   | 169        |
| 4.7      | Adverse possession and leasehold land: In brief                             | 180        |
| 4.8      | Adverse possession and human rights   | 181        |
| 4.9      | Criminalizing residential squatting   | 182        |
| 4.10     | Future directions   | 183        |
| <b>5</b> | <b>Co-ownership</b>   | <b>186</b> |
| 5.1      | Introduction  | 186        |
| 5.2      | The two forms of co-ownership   | 188        |
| 5.3      | The position at law   | 191        |
| 5.4      | The position in equity  | 192        |
| 5.5      | Severance   | 197        |
| 5.6      | Termination of co-ownership   | 214        |
| 5.7      | The legislative framework   | 215        |
| 5.8      | Purchasers of co-owned land   | 238        |
| 5.9      | Future directions   | 240        |
| <b>6</b> | <b>Interests in the Family Home</b>   | <b>245</b> |
| 6.1      | Introduction  | 245        |
| 6.2      | The role of trusts in the family home                                       | 247        |
| 6.3      | The express trust   | 248        |
| 6.4      | The implied trusts: The 'purchase money' resulting trust                    | 248        |
| 6.5      | The implied trusts: The 'common intention' constructive trust               | 254        |
| 6.6      | Joint legal ownership cases   | 256        |
| 6.7      | Sole legal ownership cases  | 263        |
| 6.8      | Trusts of the family home: Bringing it all together                         | 270        |
| 6.9      | A single regime for joint and sole cases?                                   | 271        |
| 6.10     | The common intention myth   | 272        |
| 6.11     | Reform  | 273        |
| 6.12     | 'Home rights' under the Family Law Act 1996                                 | 274        |
| 6.13     | Future directions   | 275        |

|           |   |            |
|-----------|---|------------|
| <b>7</b>  | <b>Licences</b>   | <b>278</b> |
| 7.1       | Introduction  | 278        |
| 7.2       | Licences: Character and status  | 278        |
| 7.3       | Licences: Traditional categorization  | 281        |
| 7.4       | Future directions   | 302        |
| <b>8</b>  | <b>Proprietary Estoppel</b>   | <b>304</b> |
| 8.1       | Introduction  | 304        |
| 8.2       | Proprietary estoppel: Overview  | 304        |
| 8.3       | Proprietary estoppel: Establishing an 'equity'  | 307        |
| 8.4       | Proprietary estoppel: Satisfying the 'equity'   | 322        |
| 8.5       | Proprietary estoppel: Impact on third parties   | 330        |
| 8.6       | Proprietary estoppel and constructive trusts: Doctrines compared                        | 333        |
| 8.7       | Future directions   | 335        |
| <b>9</b>  | <b>Leases</b>   | <b>338</b> |
| 9.1       | Introduction  | 338        |
| 9.2       | The nature of leases  | 341        |
| 9.3       | The essential elements of leases  | 342        |
| 9.4       | Types of leases   | 363        |
| 9.5       | The creation of leases  | 370        |
| 9.6       | The termination of leases   | 376        |
| 9.7       | Future directions: Leasehold as a hive of recent Law Commission and government activity | 380        |
| <b>10</b> | <b>Leasehold Covenants</b>  | <b>386</b> |
| 10.1      | Introduction  | 386        |
| 10.2      | Commonly encountered leasehold covenants  | 387        |
| 10.3      | The legislative framework   | 394        |
| 10.4      | The regime for leases granted pre-1 January 1996  | 394        |
| 10.5      | The regime for leases granted on or after 1 January 1996                                | 403        |
| 10.6      | The landlord's remedies for breach  | 409        |
| 10.7      | The tenant's remedies for breach  | 425        |
| 10.8      | Future directions   | 426        |
| <b>11</b> | <b>Easements and Profits</b>  | <b>429</b> |
| 11.1      | Introduction  | 429        |
| 11.2      | The nature of easements   | 433        |



|           |  |            |
|-----------|--|------------|
| 11.3      | The essential elements of easements  | 433        |
| 11.4      | The creation of easements  | 454        |
| 11.5      | The effect of easements on third parties: The legal/equitable distinction  | 485        |
| 11.6      | Remedies for interference with an easement                                 | 491        |
| 11.7      | The termination of easements   | 493        |
| 11.8      | <i>Profits à prendre</i>   | 498        |
| 11.9      | Proposed reform of easements and profits                                   | 499        |
| 11.10     | Future directions  | 500        |
| <b>12</b> | <b>Freehold Covenants</b>  | <b>504</b> |
| 12.1      | Introduction   | 504        |
| 12.2      | The nature of freehold covenants   | 506        |
| 12.3      | Enforcing freehold covenants: Original parties                             | 509        |
| 12.4      | Enforcing freehold covenants: The role of law and equity and remedies      | 512        |
| 12.5      | Enforcing freehold covenants: The legal rules                              | 513        |
| 12.6      | Enforcing freehold covenants: The equitable rules                          | 527        |
| 12.7      | Summary of the principles for the passing of benefit and burden            | 537        |
| 12.8      | Discharge and modification of freehold covenants                           | 538        |
| 12.9      | Reform of freehold covenants   | 540        |
| 12.10     | Future directions  | 540        |
| <b>13</b> | <b>Mortgages</b>   | <b>544</b> |
| 13.1      | Introduction   | 544        |
| 13.2      | The nature of mortgages  | 546        |
| 13.3      | The creation of mortgages  | 549        |
| 13.4      | The rights and powers of the mortgagor                                     | 553        |
| 13.5      | The rights of the legal mortgagee  | 575        |
| 13.6      | The rights of equitable mortgagees and equitable chargees                  | 593        |
| 13.7      | The priority of mortgages  | 594        |
| 13.8      | Future directions  | 598        |
| <b>14</b> | <b>Land Law and Human Rights</b>   | <b>601</b> |
| 14.1      | Introduction   | 601        |
| 14.2      | The relationship between land law and human rights                         | 601        |
| 14.3      | Article 1 of Protocol 1 to the ECHR  | 606        |
| 14.4      | Article 8 ECHR: The right to respect for private and family life, and home | 617        |
| 14.5      | Other ECHR provisions exerting an influence on land law                    | 626        |
| 14.6      | Future directions  | 627        |
|           | Glossary   | 631        |
|           | Index  | 635        |

# Preface

For students coming to the subject for the first time, land law can appear tricky and unfamiliar. This may be unsettling but worry not, this initial apprehension is entirely normal. Land law owes a lot to its historical past and, in particular, draws heavily on terminology and language that often feels antiquated to a modern audience. What's more, there is a commonly peddled misconception that land law cannot compete with the sexiness of, say, the criminal law, with its feverish, fast-paced depiction in televised dramas. In fact, land law is not dry at all but is a deeply stimulating and vital body of law which reaches into many of the most important moments in life. Land is the stage on which our lives play out. Land law provides the scaffolding which supports that stage. But land law is about much more than just soil and boundary fences. It is about people. It is about relationships. It is about you and me. It is about that essential cry: 'this is mine and not yours'. It is important to us all, so when you lean into this subject and embrace the colours and flavours that it has to offer, you will thrive. That is where this book comes in.

This book serves to blast away any worries you may have, tear down barriers to understanding, and cast a searching and energizing spotlight over the complexities and uncertainties of the law. This book offers a clear, vibrant, and readily understandable study of the key land law principles across its 14 chapters to prepare you for success. The aim is to provide as concise as possible an account of the law without, of course, imagining that its some 629 pages can possibly cover everything. The focus is on helping you to understand and apply the legal principles rather than delivering an encyclopaedic treatment of the law. In this book, I have adopted a more informal writing style to help you in this endeavour and to invite you into this exciting subject. I have also offered case citations using case names and dates only so as not to clog up the text, but please do remember to stick to formality in your land law essays, both in terms of writing style and making use of full case citations where appropriate (see the Table of Cases for the full citations for this book). For me, land law is a fresh, modern, and inclusive discipline, so to reflect this I have made broad use of female pronouns in contrast to the traditional textbook's male preference. Beyond this, the book includes a number of further features designed to aid your understanding:

- Key cases in each topic area are displayed distinctly in case boxes so that you can easily identify the most seminal court judgments. Note, however, that this is no substitute for reading case law in full which, naturally, you are strongly encouraged to do. It is in the reading of judgments that cases really come alive.
- Important academic thinkers are identified, further reading suggestions made, and extracts from journal articles drawn out clearly in the text.
- Frequent, carefully constructed diagrams, flowcharts, and tables help you to visualize and absorb the more complex aspects of the law.
- Generous use of headings, subheadings, and bulleted and numbered lists break down the text and make for a more digestible read.
- A 'Future directions' section at the close of each chapter explores hot debates in the topic area and considers where the law may be going next.
- A comprehensive glossary is included at the end of the book as a reference tool to dip into to help you grasp important land law concepts and terminology.

- Extensive online resources ([www.oup.com/he/bevan3e/](http://www.oup.com/he/bevan3e/)) as detailed on page xv, to help you to check your understanding and revise, answer essay questions, stay updated on developments in land law since publication, and engage even further with the debates and cases covered in the book.

Of course, like other areas of the law, land law has its fair share of fascinating complexities, depths, and nuances which cannot and should not be overlooked. Whilst seeking to offer clarity, this book therefore does not shy away from exploring these thornier issues which will help you to gain a comprehensive and rounded understanding of the law. At all times, however, my aim in writing this book has been to provide a lively, thought-provoking yet readable text that motivates, enthuses, and engages you, as students of land law, in the joys of this great subject. I hope that once you have read the book, you will share my passion for land law—on which note, please don't hesitate to get in touch with me directly if you have any questions or feedback: my email address is: [christopher.w.bevan@durham.ac.uk](mailto:christopher.w.bevan@durham.ac.uk).

Enjoy it!

# Acknowledgements

As I have discovered in writing this book, there is much more to the exercise than merely putting words on the page. Rather, the process has involved genuine collaboration and I have drawn real support from a whole raft of sources. In this vein and for this third edition, I remain sincerely grateful to the outstanding team at OUP who have shown me nothing but brimming enthusiasm, energy, and encouragement at all stages of the production of this book. In particular, I express my keenest gratitude to Lucy Read and Emma Sheffield who have walked every step of the project with me. I thank also those academic colleagues who provided invaluable feedback on the second edition which, as a result, I am in no doubt, have resulted in this third edition being a better work.

A textbook is a living, breathing, and shifting creature and, as this the third edition is published, I remain indebted to my students past and present who are easily the most rewarding aspect of my job. It is for them that this book is written and it is they who unwittingly sound in and have helped to shape every page and who are a continued inspiration to make the book as clear and effective as it can possibly be. In the two years since the second edition was published, the university sector (like the whole of society) has been shaken by the Covid-19 pandemic. This has presented unprecedented challenges, unexpected opportunities, and welcome space to reflect on what teaching and learning really means and how a textbook such as mine can guide students towards whatever shape their learning may take. This essential reflection has been deeply productive in informing this third edition.

Once again to those who are, it seems to me, all too-often underacknowledged when books are written: family. To Mum, Bill, and Claire, I thank you for the unswerving belief and confidence you always have in me when I do not. To Andy, I thank you for your unending and sustaining support, for keeping me sane in ways no one else can and, above all, for being the light of my life. Finally, to two great friends to whom this book remains dedicated: Eddie and Dennis.

Chris Bevan  
Durham  
September 2021

# New to this Edition

## Updates to the approach in the third edition:

- Enhanced and expanded discussion of fixtures and chattels, adverse possession, and leasehold covenants
- New and improved figures, tables, and flowcharts
- New animated diagrams and example legal documents with annotation on the online resources: [www.oup.com/he/bevan3e/](http://www.oup.com/he/bevan3e/). See the 'Guide to Using the Book' page for advice on how the book's extensive online resources can help with your understanding of the topics you find most difficult.

## New cases explored in the third edition:

- On fixtures and chattels: *Royal Parks v Bluebird Boats* (2021); *Spielplatz Ltd v Pearson* (2015)
- On items found in or on land: *Moffat v Kazana* (1969); *Waverley Borough Council v Fletcher* (1995); *Parker v British Airways Board* (1982)
- On registered land: *Ali v Dinc* (2020); *Patel v Freddy's* (2017); *Rees v 82 Portland Place* (2020); *Dhillon v Barclays Bank plc* (2020); *Knight v Fernley* (2021); *Pennistone Holdings Ltd v Rock Ferry Waterfront Trust* (2021)
- On adverse possession: *Amirtharaja v White* (2021); *Greenmanor Ltd v Pilford* (2012); *Chambers v London Borough of Havering* (2011); *Fruin v Fruin* (1983); *Port of London v Ashmore* (2010); *Roberts v Swangrove Estates Ltd* (2007); *Lambeth LBC v Blackburn* (2001)
- On co-ownership: *Scarle v Scarle* (2019); *Re Ninian (Deceased)* (2019); *Re Amos (Deceased)* (2020); *Challen v Challen* (2020); *Solomon v McCarthy* (2020); *Gandesha v Gandesha* (2020); *Grant v Baker* (2016); *Pickard v Constable* (2017)
- On licences: *Gilham v Breidenbach* (1982); *Re Hampstead Garden Suburb Institute* (1995); *Manchester Ship Canal Co. Ltd v Vauxhall Motors Ltd* (2019)
- On proprietary estoppel: *Horsford v Horsford* (2020); *Howe v Gossop* (2021); *Kirkbright v Toseva* (2021)
- On leases: *Proctor v Proctor* (2021); *Southwark LBC v Ludgate House* (2020); *Smoke Club Ltd and others v Network Rail Infrastructure Ltd* (2021); *Global 100 Ltd v Laleva* (2021)
- On easements: *Adealon International Corp. Proprietary Ltd v London Borough of Merton* (2007); *Hughes v Incumbent of the benefice of Frampton-on-Severn, Arlingham, Saul, Fretherne & Framilode* (2021); *Bockenfield Aerodrome Ltd v Clarehugh* (2020)
- On freehold covenants: *Alexander Devine Children's Cancer Trusts v Housing Solutions Ltd* (2020)
- On leasehold covenants: *Gibbs v Lakeside Developments Ltd* (2018); *Timbo v Lambeth LBC* (2019)
- On mortgages: *Serene Construction Ltd v Salata and Associates Ltd* (2021)
- On land law and human rights: *R (on the application of Mott) v Environment Agency* (2018)

## New Law Commission Reports explored in the third edition:

- Law Commission Reports No 392, *Leasehold Home Ownership: Buying your Freehold or Extending your Lease* (2020); No 393, *Leasehold Home Ownership: Exercising the Right to Manage* (2020), and No 394, *Reinvigorating Commonhold: The Alternative to Leasehold Ownership* (2020)

# Guide to Using this Book

## ELEVATE YOUR LEARNING WITH LAND LAW

Chris Bevan's *Land Law* offers a rich learning experience, which brings the law to life in order to support a detailed understanding of the subject area. Outlined here are the key features and tools included in the book and the online resources to ensure you understand each topic, how the law applies in practice, and where the law might go in future.



[www.oup.com/he/bevan3e/](http://www.oup.com/he/bevan3e/)

## UNDERSTAND AND CONTEXTUALIZE the topic at hand

Chapter introductions outline the topic, and prompt questions that will be at the forefront of your learning throughout each chapter.

## KEY CASES demystified

Directing you towards a better analysis of the law, each key case is set out clearly from the main text. Broken down into sections covering 'Facts', 'Legal issue', and 'Judgment', the significance of the cases is made plain, enabling you to see the evolution of the law and how it has been applied. Online, you can find links which take you direct to the judgments themselves, making it easy to read the law for yourself.

## REVISE AND MEMORIZE WITH OVER 95 diagrams and visual aids

Consolidate your learning through diagrams and flowcharts (with audio walk-throughs on some flowcharts accessible online) that explain key concepts or legislation in a digestible way. Visual scenarios with guidance from the author are also online to help to visualise concepts. Keep these to hand while revising by downloading them for quick-fire ways to retain important information.

## GO FURTHER WITH YOUR LEARNING by considering the future of land law and wider debates

Every chapter is summarized with a 'Future directions' section which prompts investigative thought and asks you to consider how land law might develop over time. This is accompanied by further reading within the text with additional links online to external sources of information.

## TEST YOUR KNOWLEDGE with self-test and scenario-style questions

Online, each chapter is accompanied by self-test questions which provide instant feedback on important facts and legislation. You can also practise scenario questions for every chapter, enabling you to engage practically with the content. These questions, accompanied by notes on what a good answer would cover and how it might be structured, will help you to develop your essay-writing techniques and improve your performance in coursework and exams.

**WATCH, LISTEN, AND LEARN from the author**

Videos and audio podcasts (with transcripts) are available online, allowing you to hear direct from the author as he helps with assessment preparation and discusses the importance of key topics in their wider context.

**RELATE TO THE LAW by learning from professionals in the field**

Exclusive to this book, you can watch Chris Bevan in conversation with leading barristers who appeared in seminal land law cases such as *Stack v Dowden* (2007), *Wood v Waddington* (2015), and more. Complementing the book's extensive use and analysis of case law, these videos bring the judgments to life, giving you a greater and more nuanced understanding of land law.

**INTERACT AND INTEGRATE your learning through tasks**

Matching exercises and interactive timelines available online offer a different way of revising topics and testing your understanding.

**REVISE KEY TERMS and definitions in the glossary**

Throughout the text, words emboldened with colour signal key legal terms. You can learn the definitions to accompany these by accessing the glossary at the end of the book.

# Table of Cases

Page numbers in bold indicate where cases are explored as part of the book's Key Cases feature.

## United Kingdom

- 18 Wansborough v Maton (1836) 4 Ad and El 884 ... 20
- 88 Berkeley Road, Re [1971] Ch D 648 ... 203
- A2 Dominion Homes Ltd v Prince Evans Solicitors [2015] EWHC 2490 (Ch) ... 72
- Abbey National Bank plc v Stringer [2006] EWCA Civ 338 ... 564, **566**
- Abbey National Building Society v Cann [1991] 1 AC 56 ... 65, **96–7**, 102, **596**
- Abbey National plc v Moss [1994] 2 FCR 587 ... 228
- Abbeyfield Society v Woods [1968] 1 WLR 374 ... 345–6
- Ackroyd v Smith (1850) 10 CB 164 ... 439
- Adealon International Corpn Proprietary Ltd v London Borough of Merton [2007] EWCA Civ 362 ... 459–60
- Adekunle v Ritchie [2007] BPIR 1177 (Leeds CC) ... 251
- AG Securities v Vaughan [1990] 1 AC 417 ... 345, 348–9, 383
- Agency Co. Ltd (Trustees and Executors) v Short (1888) JPCPC 793 ... 166
- AIB v Turner [2016] EWHC 219 (Ch) ... 98–9, 102
- AIB Finance Ltd v Debtors [1998] 2 All ER 929 ... 589
- Akici v L.R. Butlin Ltd [2005] EWCA Civ 1296 ... 416, 418–19
- Aldin v Latimer [1894] 2 Ch 437 ... 389
- Alexander Devine Children's Cancer Trusts v Housing Solutions Ltd [2020] UKSC 45 ... 539
- Alford v Hannaford [2011] EWCA Civ 1099 ... 465, 474–5
- Alfred F. Beckett Ltd v Lyons [1967] 2 WLR 445 ... 436
- Ali v Dinc [2020] EWHC 3055 (Ch) ... 67–8
- Allcard v Skinner [1887] 36 Ch D 145 ... 564–5, 569
- Allen v Matthews [2007] 2 P & CR 21 ... 158, 166, 168
- Alliance & Leicester v Slayford (2001) 33 HLR 66 ... 576
- Allied London Investments Ltd v Hambro Life Assurance Ltd (1984) 269 EG 41 ... 395
- Amalgamated Property Co. v Texas Bank [1982] QB 84 ... 267
- Amin v Amin [2020] EWHC 2675 (Ch) ... 272
- Amirtharaja v White [2021] EWHC 330 (Ch) ... 165
- Amos (Deceased), Re [2020] EWHC 1063 (Ch) ... 214
- Amsprop Trading Ltd v Harris Distribution Ltd [1997] 1 WLR 1025 ... **510–11**
- Anchor Brewhouse Developments v Berkeley House (Docklands Developments) Ltd [1987] EGLR 172 ... 6
- Anders v Haralambous [2013] EWHC 2676 (QB) ... 416
- Angus v Dalton (1877) 3 QBD 85 ... 478
- Annulment Funding Company Ltd v Cowey [2010] EWCA Civ 711 ... 575
- Antoni v Antoni [2007] UKPC 10 ... 250
- Antoniades v Villiers [1990] 1 AC 417 ... 345, 348, **349**, 354
- Appah v Parncliffe Investments Ltd [1964] 1 All ER 838 ... 345–6
- Appleby v Cowley, *The Times*, 14 April 1982 Ch D ... 330
- Archangel v Lambeth London Borough Council (2001) 33 HLR 44, CA ... 166, 168
- Arif v Anwar [2015] EWHC 124 (Fam) ... 312
- Armory v Delamirie (1722) 1 Strange 505, 93 ER 664 ... 10, 13
- Ashburn Anstalt v Arnold [1989] Ch 1 ... 78, 281, 292, 294, 297–9, 301, 356–8, 360, 362–3
- Ashby v Tolhurst [1937] 2 All ER 837 ... 284
- Aslan v Murphy [1990] 1 WLR 766 ... 345, 347–8, **350–1**
- Aspden v Elvy [2012] 2 FLR 807 ... 260, 265
- Associated British Ports v C.H. Bailey plc [1990] 2 AC 703 ... 422
- Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2004] 1 AC 546 ... 609
- Attorney-General v Morgan (1891) 1 Ch 432 ... 8



- Attorney-General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd [1987] 2 All ER 387 ... 313
- Austerberry v Oldham Corp. (1885) 29 Ch D 750 ... **521**, 522–3, 529, 538, 540–1
- Azfar's Application, Re (2002) 1 P & CR 215 ... 538
- B & Q plc v Liverpool and Lancashire Properties Ltd (2001) 81 P and CR 20 ... 491
- Bagum v Hafiz [2016] Ch 241 ... **222**
- Bailey v Stephens (1862) 12 CB (NS) 91 ... 438, 498
- Bainbrigge v Browne (1881) 18 ChD 188 ... 564
- Baker v Craggs [2018] EWCA Civ 1126 ... 83
- Bakewell Management Ltd v Brandwood [2004] 2 AC 519 ... **480**, 481
- Balevents Ltd v Sartori [2011] EWHC 2437 (Ch) ... 158, 174
- Ballard's Conveyance, Re [1937] Ch 473 ... 516
- Banjo v Brent LBC [2005] EWCA Civ 292 ... 366
- Bank Mellat v HM Treasury (No. 2) [2014] AC 700 ... 613
- Bank of Credit and Commerce International SA v Aboody [1990] 1 QB 923 ... 563
- Bank of Ireland Home Mortgages v Bell [2001] 2 FLR 809 ... 226, **230–1**, 232
- Bank of Ireland Home Mortgages v South Lodge [1996] 14 EG 92 ... 421
- Bank of Scotland v Bennett [1998], unreported ... 562
- Bank of Scotland v Grimes [1986] QB 1179 ... 583
- Bank of Scotland v Hussain [2010] EWHC 2812 (Ch) ... 107
- Bank of Scotland v Miller [2001] Civ 344 ... 582
- Bank of Scotland plc v Zinda [2012] 1 WLR 728 ... 585–6
- Barca v Mears [2004] EWHC 2170 ... 236–8, 243, 627
- Barclays Bank v Caplan [1998] 1 FLR 532 ... 572–3
- Barclays Bank plc v Guy [2008] EWCA Civ 452 ... 66, 112
- Barclays Bank plc v O'Brien [1994] 1 AC 180 ... 561, 563–4, 568, **574–5**
- Barclays Wealth Trustees v Erimus Housing [2014] 2 P & CR ... 365–6
- Barnes v Phillips [2015] EWCA Civ 1056 ... 260, 262
- Barrett v Barrett [2008] EWHC 1061 (Ch) ... 270
- Barrett v Lounova (1982) Ltd [1990] 1 QB 348 ... 387
- Barton v Church Commissioner for England [2008] EWHC 3091 (Ch) ... 498
- Barton v Morris [1985] 2 All ER 1032 ... 198
- Basham, Re [1986] 1 WLR 1498 ... 312
- Basildon DC v Manning (1975) 237 EG 879 ... 154
- Batchelor v Marlow [2003] 1 WLR 764 ... **448–9**, 450, 501
- Baten's Case (1610) 9 Co Rep 53b ... 6
- Bathurst v Scarborough [2004] EWCA Civ 411 ... 195
- Baxter v Mannion [2011] EWCA Civ 120 ... 111, 172
- Beaulane Properties Ltd v Palmer (2006) HRLR 19 ... 160
- Bedson v Bedson [1965] 2 QB 666 ... 198, 206
- Begum v Issa [2014] EW Misc B51 ... 107
- Bendall v McWhirter [1952] 2 QB 466 ... 294
- Benn v Hardinge (1993) 66 P & CR 246 ... 494
- Berkley v Poulett [1977] 1 EGLR ... 20–1, **22**, 23–4, 26
- Bernel Ltd v Canal and River Trust [2021] EWHC 16 (Ch) ... 497–8
- Bernstein of Leigh (Baron) v Skyviews & General Ltd [1978] QB 479 ... 5, **6**, 7
- Berrisford v Mexfield [2011] UKSC 52; [2012] 1 AC 955 ... 355–6, **359**, 360–1, 382
- Beswick v Beswick [1968] AC 58 ... 511
- Best v Chief Land Registrar [2015] EWCA Civ 17 ... 183
- Bhullar v McArdle [2001] EWCA Civ 510 ... 100
- Biggs v Hoddinott [1898] 2 Ch 307 ... 557
- Billson v Residential Apartments Ltd [1992] 1 AC 494 ... 410–12, 419, 422
- Binions v Evans [1972] Ch 359 ... 75, 292, **295–6**, 297, 299–300
- Bird v Syme-Thomson [1979] 1 WLR 440 ... 95, 103
- Birdlip Ltd v Hunter [2016] EWCA Civ 603 ... **536–7**
- Birmingham Citizen's Permanent Building Society v Caunt [1962] Ch 883 ... 579–80, 582
- Birmingham, Dudley and District Banking Co. v Ross [1887] 38 Ch D 295 ... 458
- Birmingham Midshires Mortgage Services Ltd v Sabherwal (2000) 80 P & CR 256 ... 85, 122, 129, 331, 333, 628
- Birrell v Carey (1989) 58 P & CR 184 ... 362
- Bissessar v Lall [Privy Council Appeal No. 43 of 2003] ... 157
- Blacklocks v J.B. Developments [1982] Ch 183 ... 94, 101
- Blades v Higgs (1865) 11 HL Cas 621 ... 5, 8

- Bland v Ingram's Estates Ltd (No. 2) [2002] Ch 177 ... 413, 421
- Bligh v Martin [1968] 1 WLR 804 ... 161, 167
- Bockenfield Aerodrome Ltd v Clarehugh [2021] EWHC 848 (Ch) ... 493
- Booker v Palmer [1942] 2 All ER 674 ... 354
- Boosey v Davis (1988) 55 P & CR 83 ... 154–5
- Borman v Griffith [1930] Ch 493 ... 430, 467–8, 472
- Borwick Development Solutions Ltd v Clear Water Fisheries Ltd [2020] EWCA Civ 578 ... 8
- Bostock v Bryant (1990) 22 HLR 449 ... 362
- Boswell v Crucible Steel Co. [1925] 1 KB 119 ... 19
- Botham and others v TSB Bank plc [1997] 73 P & CR D1 ... 21, 24–6
- Boyer v Warbey [1953] 1 QB 234 ... 401–2
- BP Properties Ltd v Buckler [1987] EWCA Civ 2 ... 158–9
- Bradbury v Taylor [2012] EWCA Civ 1208 ... 318, 336
- Bradford Corporation v Pickles [1895] AC 587 ... 602
- Bradley v Carrit [1903] AC 25 ... 557
- Bremner, Re (1999) 1 FLR 912 ... 235–6
- Bretherton v Paton [1986] 1 EGLR 172 ... 354
- Brilliant v Michaels [1945] 1 All ER 121 ... 356
- Bristol & West Building Society v Ellis (1997) 73 P & CR 158 ... 585
- Bristol & West Building Society v Henning [1985] 1 WLR 778 ... 595–6
- British Railways Board v Glass [1965] Ch 538 ... 495
- British Waterways Board v Toor [2006] EWHC 1256 (Ch) ... 158
- Brocklesby v Temperance Permanent Building Society [1895] AC 173 ... 597
- Brown & Root Technology Ltd v Sun Alliance and London Assurance Co. [1996] EWCA Civ 1261 ... 65
- Browne v Flower [1911] 1 Ch 219 ... 388, 444
- Browne v Perry [1991] WLR 1297 ... 168
- Brunner v Greenslade [1971] Ch 993 ... 536
- Bruton v London and Quadrant Housing Trust [2000] 1 AC 406 ... 28, 32, 341, 363, 367, **368**, 369–70, 382, 621
- Bryant v Foot (1867) LR 2 QB 161 ... 481
- Bryant Homes Southern Ltd v Stein Management [2016] EWHC 2435 (Ch) ... 514
- Buchanan-Wollaston's Conveyance, Re [1939] Ch 738 ... 223
- Buckinghamshire County Council v Moran [1990] Ch 623 ... 149, 151–2, **154**, 155, 158–9, 161–4
- Buckland v Butterfield (1820) 2 Brod. & Bingh. 54 ... 19, 21
- Burgess v Rawnsley [1975] Ch 429 ... 199, 202, 208, **209**, 210
- Burns v Burns [1984] Ch 317 ... 249, 269
- Burton v Camden LBC (1997), unreported ... 378
- Byers v Samba Financial Group [2021] EWHC 60 (Ch) ... 68
- C v S (2008) IEHC ... 207
- C. Putnam & Sons v Taylor (2009) EWHC 317 (Ch) ... 231–2
- Cable v Bryant [1908] 1 Ch 259 ... 430
- Caddick v Whitsand Bay Holiday Park Ltd [2015] UKUT 63 (LC) ... 21
- Caern Motor Services Ltd v Texaco Ltd [1994] 1 WLR 1249 ... 398–9
- Calabar v Stitcher [1984] 1 WLR 287 ... 426
- Caldwell v Fellowes (1870) LR 9 Eq 410 ... 205
- Camden LBC v Shortlife Community Housing [1993] 25 HLR 330 ... 297
- Camelot Guardian Management Ltd v Khoo [2018] EWHC 2296 (QB) ... 345, 351–3
- Camelot Property Management Ltd v Roynon (2017), 24 February 2017, unreported ... 345, 351–3
- Campbell v Banks [2011] EWCA Civ 61 ... 473–4
- Campbell v Griffin [2001] EWCA Civ 990 ... 317–18
- Campbell v Holyland (1877) 7 Ch D 166 ... 592
- Canadian Imperial Bank of Commerce v Bello [1992] 64 P & CR 48 ... 362
- Canham v Fisk (1831) 2 Cr & J 126 ... 437
- Cargill v Gotts [1981] 1 WLR 441 ... 495
- Carlgarth, The [1927] P 93 ... 282
- Carr v Isard [2007] WTLR 409 ... 198
- Casborne v Scarfe (1738) 37 ER 600 ... 555
- Case of Mines (1567) 1 Plowden 310 ... 8
- Caunce v Caunce (1969) 1 WLR 286 (Ch) ... 95, 141–2
- Cavalier v Pope [1906] A.C. 428 ... 389
- Celsteel Ltd v Alton House Holdings Ltd [1985] 1 WLR 204 ... 490, 492
- Central Estates (Belgravia) Ltd v Woolgar (No. 2) [1972] 1 WLR 1048 ... 411
- Central London Commercial Estates Ltd v Kato Kagaku Co. Ltd [1998] 4 All ER 98 ... 179
- Centrax Trustees v Ross [1979] 2 All ER 952 ... 583

- Centrovincial Estates plc v Bulk Storage Ltd (1983)  
 46 P & CR 393 ... 397
- CGIS City Plaza Shares 1 Ltd v Britel Fund Trustees  
 Ltd [2012] EWHC 1594 (Ch) ... 483
- Chadwick v Collinson [2014] EWHC 3055  
 (Ch) ... 213
- Challen v Challen [2020] EWHC 1330 (Ch) ... 214
- Chambers v London Borough of Havering [2011]  
 EWCA Civ 1576 ... 155, 159
- Chambers v Randall [1923] 1 Ch 149 ... 512, 516
- Chan Pui Chun v Leung Kam Ho [2002] EWCA Civ  
 1075 ... 219
- Chandler v Kerley [1978] 1 WLR 693 ... 285
- Charville Estates Ltd v Unipart [1997] EGCS  
 36 ... 379
- Chaudhary v Yavuz [2013] Ch 249 ... 78–9, 101,  
 299–300, 485, 490–1
- Chelsea Yacht & Boat Co. Ltd v Pope [2000] 1 WLR  
 1941 ... 21
- Cheltenham & Gloucester Building Society v Norgan  
 [1996] 1 WLR 343 ... 579, 583, **584**
- Cheltenham & Gloucester plc v Krausz [1997] 1  
 WLR 155 ... 579–80, 585, 591
- Chesterfield Properties Ltd v BHP Great Britain  
 Petroleum Ltd [2001] 3 WLR 277 ... **407–8**
- Chhokar v Chhokar [1984] FLR 313 ... **97–8**, 99
- Chief Land Registrar v Franks [2011] EWCA Civ  
 772 ... 172
- Chowood's Registered Land, Re [1933] 1 Ch  
 574 ... 112, 116
- Churchill v Temple [2010] EWHC 3369  
 (Ch) ... 510
- Churston Golf Club Ltd v Haddock [2019] EWCA  
 Civ 544 ... 445
- CIBC Mortgages plc v Pitt [1993] 4 All ER  
 433 ... 563, **569–70**
- Citro, Re [1991] Ch 142 ... 235–7
- City of London Building Society v Flegg [1988]  
 AC 54 ... 75, 82, **83**, 93–4, 96, 594
- City of London Corp. v Fell [1994] 1 AC 458  
 (HL) ... 394, 396
- City Permanent Building Society v Miller [1952]  
 Ch 840 ... 90
- Cityland and Property (Holdings) Ltd v Dabrah  
 [1968] Ch 166 ... 559
- Clark v Elphinstone (1880) 6 App Cas 164; [1880]  
 UKPC 52 ... 157
- Clarke v Dupre Ltd [1992] Ch 297 ... 410
- Clarke v Swaby [2007] All ER (D) 78 (Jan) ... 330
- Cloughton v Charalambous [1999] 1 FLR 740 ... 236
- Cleaver v Mutual Reserve Fund Life Association  
 [1892] 1 QB 147 ... 212
- Clore v Theatrical Properties Ltd [1936] 3 All ER  
 483 ... 292–3, 297, 299
- Clowes Developments (UK) Ltd v Walters [2005]  
 EWHC 669 (Ch) ... 159
- Coatsworth v Johnson (1886) 54 LT 320 ... 374
- Cobb v Lane [1952] 1 TLR 1037 ... 354
- Cobden Investment Ltd v RWM Langport Ltd [2008]  
 EWHC 2810 (Ch) ... 309
- Colchester BC v Smith [1991] 2 WLR 540 ... 158,  
 363
- Colchester BC v Smith [1992] Ch 421 ... 168
- Coles v Samuel Smith Old Brewery and Rochdale  
 [2007] EWCA Civ 1461 ... 135
- Colin Dawson Windows Ltd v King's Lynn & West  
 Norfolk BC [2005] EWCA Civ 9 ... 159
- Collin's Application, Re (1974) 30 P & CR 527 ... 538
- Collis v Home & Colonial Stores [1904] AC  
 179 ... 430
- Co-Op Insurance Society v Argyll Stores [1997] 2  
 WLR 898 ... 425
- Cooper v Henderson (1982) 263 EG 592 ... 417
- Copeland v Greenhalf [1952] Ch 488 ... **447–8**
- Corbett v Halifax Building Society [2002] EWCA Civ  
 1849 ... 591
- Cornillie v Saha (1996) 72 P & CR 147 ... 410
- Costagliola v English (1969) 210 EG 1425 ... 467
- Crabb v Arun DC [1976] Ch 179 ... 308, 318, 322,  
 328–9, 484
- Crawley v Ure [1996] 1 QB 13 ... 377
- Creative Foundation v Dreamland Leisure Ltd, The  
 [2015] EWHC 2556 (Ch) ... 26
- Credit Lyonnais v Burch [1997] 1 All ER 144 ... 564
- Crest Nicholson Residential (South) Ltd v McAllister  
 [2004] 1 WLR 2409 ... 519, **520**, 528
- Crinion v Minister for Justice (1959) Ir Jur Rep  
 15 ... 12
- Crow v Wood [1971] 1 QB 77 ... 430, 444–5
- Cuckmere Brick Co. v Mutual Finance [1971]  
 Ch 949 ... 587, **589**, 590
- Cukurova Finance International Ltd v Alfa Telecom  
 Turkey Ltd [2013] UKPC 20 ... 580
- Curley v Parkes [2004] EWCA Civ 1515 ... 249
- Curran v Collins [2015] EWCA Civ 404 ... 267

- Dalton v Angus & Co. (1881) 6 LR App Cas 740 ... 430, 479, 482
- Das v Linden Mews [2002] EWCA Civ 590 ... 451
- Davies v Davies [2016] EWCA Civ 463 ... 318, **324–6**, 327–8, 336
- Davies v Jones [2009] EWCA Civ 1164; [2010] 1 P & CR 22 ... 525
- de Falbe, Re [1901] 1 Ch 523 ... 24, 27
- De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 ... 613
- Deen v Andrews (1985) 135 NLJ 728 ... 20
- Dennis, Re [1996] Ch 80 ... 208
- Denny, Re (1947) 177 LT 291 ... 199
- Derbyshire CC v Fallon [2007] EWHC 1326 (Ch) ... 114
- D'Eyncourt v Gregory (1866) LR 3 Eq 382 ... 22–5
- Dhillon v Barclays Bank [2020] EWCA Civ 619 ... 114
- DHN Food Distributors Ltd v London Borough of Tower Hamlets [1976] 3 All ER 462 ... 292, 295, **296**, 297
- Diligent Finance v Alleyne (1972) 23 P & CR 346 ... 132
- Dill v Secretary of State [2020] UKSC 20 ... 23
- Dillwyn v Llewellyn [1862] EWHC Ch J67 ... 318, 328
- Dobson v Griffey [2018] EWHC 1117 (Ch) ... 312, 316–17
- Dodsworth v Dodsworth (1973) 228 EG 1115 ... 322
- Doe d. Lockwood v Clarke (1807) 8 East 185 ... 410
- Doherty v Birmingham City Council (2008) UKHL 57; [2009] 1 AC 367 ... 620–2
- Dolphin's Conveyance, Re [1970] Ch 654 ... 536
- Donohoe v Ingram [2006] EWHC 282 ... 627–8
- Donovan v Rana [2014] EWCA Civ 99 ... 462
- Dowse v Bradford MBC [2020] UKUT 202 (LC) ... 175–6
- Draper's Conveyance, Re [1969] 1 Ch 486 ... 199–200, **201**, 202, 207
- Duffield v Gandy [2008] EWCA Civ 379 ... 538
- Duffy v Lamb (1998) 75 P & CR 364 ... 444
- Duke of Westminster v Guild [1985] QB 688 ... 444
- Dunbar v Plant [1998] Ch 412 ... 212–13
- Dunbar Bank v Nadeem [1998] EWCA Civ 1027 ... **572–3**
- Dunraven Securities v Holloway [1982] 2 EGLR 47 ... 417
- Dyce v Lady James Hay (1852) 1 Macq 305 ... 446
- Dyer v Terry [2013] EWHC 209 (Ch) ... 165
- Eastaugh v Crisp [2007] EWCA Civ 638 ... 379
- Easton v Isted (1903) 1 Ch 405 ... 444
- Eaton v Swansea Waterworks Co. [1851] EngR 559 ... 479
- Ecclesiastical Commissioners for England v Kino (1880) 14 Ch D 213 ... 494
- Edgington v Clark [1964] 1 QB 367 ... 168
- Edwards v Edwards & Bank of Scotland [2010] EWHC 652 (Ch) ... 231
- Edwards v Kumarasamy [2016] UKSC 40 ... 390
- Edwards v Lloyds TSB [2004] EWHC 1745 ... **231–2**
- Elitestone Ltd v Morris [1997] 1 WLR 687 ... 5, 17, **18**, 19–21, 25–6
- Ellenborough Park, Re [1956] Ch 131 ... **434**, 435, 437–8, 440–4, 447, 450, 468, 472, 476–7, 481, 485
- Elliston v Reacher [1908] 2 Ch 374 ... 523, 536
- Elwes v Brigg Gas Company (1886) 33 ChD ... 5, 9–10
- Elwood v Goodman [2014] 2 WLR 967 ... 525
- Ely v Robson [2016] EWCA Civ 774 ... 312
- Emmett v Sissons [2014] EWCA Civ 64 ... 492
- EON Motors Ltd v Secretary of State for the Environment [1981] 1 EGLR 19 ... 364
- Epps v Esso Petroleum [1973] 1 WLR 1071 ... 101
- Equity and Law Home Loans Ltd v Prestidge [1992] 1 WLR 137 ... 596
- E. R. Ives Investment Ltd v High [1967] 2 QB 379 ... 131–2, 136, 138, 328, 331, 333, 484, 489
- Errington v Errington and Woods [1952] 1 KB 290 ... 292–3, **294**, 296–8, 366
- E.S. Schwarb & Co. Ltd v McCarthy [1976] 31 PC & R 196 ... 379
- Esso Petroleum Co. Ltd v Harpers Garage (Stourport) Ltd [1968] AC 269 ... 556
- Estate of Crippen, Re [1911] P 108 ... 212
- Estate of Hall, Re [1914] P 192 ... 212
- Estate of Heys, In the [1914] P 192 ... 211
- Everitt v Budhram [2009] EWHC 1219 (Ch) ... 234–6
- Evers' Trust, Re [1980] 1 WLR 1327 ... 216, 226
- Eves v Eves [1975] 1 WLR 1338 ... 265, **266**, 267–8
- Expert Clothing Service & Sales Ltd v Hillgate House Ltd [1986] Ch 340 ... 415, **416–17**, 418–19

- Facchini v Bryson [1952] 1 TLR 1386 ... 354  
 Fairclough v Swan Brewery Co. [1912] AC 565 ... **555–6**  
 Farrars v Farrars Ltd (1889) 40 Ch D 395 ... 590  
 Federated Homes Ltd v Mill Lodge Properties Ltd [1980] 1 WLR 594 ... 516, **517–18**, 519–20, 534  
 Ferrishurst Ltd v Wallcite Ltd [1999] Ch 353 ... 103  
 Fettishaw's Application (No. 2), Re (1973) 27 P & CR 292 ... 538  
 First Middlesbrough Trading and Mortgage Co. Ltd v Cunningham (1974) 28 P & CR 69 ... 584  
 First National Bank plc v Achampong [2003] EWCA 487 ... 232, **573–4**  
 First National Bank plc v Thompson [1996] 1 All ER 149 ... 367  
 First National Security Ltd v Hegerty [1985] QB 850 ... 206, **207**  
 Fisher v Wigg (1700) 24 ER 274 ... 194  
 Fitzkriston LLP v Panayi [2008] EWCA Civ 283 ... 370  
 Fitzwilliam v Richall Holding Services [2013] EWHC 86 (Ch) ... 68, 112  
 Foenander v Allan [2006] BPIR 1392 ... 236–7  
 Ford v Alexander [2012] EWHC 266 (Ch) ... 238  
 Formby v Barker (1903) ... 512  
 Four-Maids Ltd v Dudley Marshall (Properties) Ltd [1957] Ch 317 ... 578  
 Fowler v Barron [2008] EWCA Civ 377 ... 259  
 Foyle v Turner [2007] BPIR 43 ... 238  
 Francis v Cowcliffe (1977) 33 P & CR 368 ... 426  
 Fred Perry Ltd v Genis [2014] 1 P & CR DG5 ... 231, 232  
 Freifeld v West Kensington Court Ltd [2015] EWCA Civ 806 ... 420  
 Friends Provident Life Office v British Railways Board (1997) 73 P & CR 9 ... 396  
 Fruin v Fruin [1983] Court of Appeal bound transcript 448 ... 154, 165  
 Gafford v Graham [1998] EWCA Civ 666 ... 513  
 Gallarotti v Sebastianelli [2012] 2 FLR1231 ... 251, 254, 270  
 Gandesha v Gandesha [2020] EWHC 1743 (QB) ... 224  
 Gardner v Hodgson's Kingston Brewery Co. Ltd [1903] AC 229 (HL) ... 484  
 Gascoigne v Gascoigne [1918] 1 KB 223 ... 250  
 Geary v Rankine [2012] EWCA Civ 555 ... 272  
 Gee v Gee [2018] EWHC 1393 (Ch) ... 318–19, 321  
 George Wimpey & Co. Ltd v Sohn [1967] Ch 487 ... 154–5, 162–3  
 Ghaidan v Godin-Mendoza [2004] 2 AC 557 ... 626–7  
 Gibbs v Lakeside Developments [2018] EWCA Civ 2874 ... 414  
 Gifford v Dent (1926) 71 SJ 83 ... 6  
 Gilham v Breidenbach [1982] RTR 328 ... 282  
 Gill v Lewis [1956] 2 QB 1 ... 414  
 Gillett v Holt [2001] Ch 210 ... 308–9, **314**, 317–19, 334  
 Gilpin v Legg [2017] EWHC 3220 (Ch) ... 20, 361  
 Gissing v Gissing [1971] AC 886 ... 249, 257, 265, 269, 295  
 Glass v Kencakes [1966] 1 QB 611 ... 416  
 Global 100 Ltd v Laleva [2021] EWCA Civ 1835 ... 345, 351, 353  
 Goldberg v Edwards [1950] Ch 247 ... 473  
 Golding v Martin [2019] EWCA Civ 446 ... 413  
 Goodman v Gallant [1986] 2 WLR 236; [1986] Fam 106 ... **193**, 194, 198–200, 248, 271  
 Gore v Naheed [2017] EWCA Civ 369 ... **452–3**  
 Gore and Snell v Carpenter [1990] 60 P & CR 456 ... 200, 210–11  
 Gow v Grant [2012] UKSC 29 ... 273  
 Graham v Philcox [1984] QB 747 ... 470  
 Graham-York v York [2015] EWCA Civ 72 ... 260, 270  
 Grand v Gill [2011] EWCA Civ 554 ... 390  
 Grant v Baker [2016] EWHC 1782 (Ch) ... 235–6  
 Grant v Edwards [1986] Ch 638 ... 265, **266**, 267–8  
 Gray v Barr [1971] 2 QB 554 ... 212  
 Gray v Taylor [1998] EWCA Civ 603 ... 354  
 Greasley v Cooke [1980] 1 WLR 1306 ... 267, 315, 318  
 Great Northern Railway Co. v Arnold (1916) 33 TLR 114 ... 357  
 Green v Ashco Horticulturist Ltd [1966] 1 WLR 889 ... 467, 473  
 Green v Eales (1841) 2 QB 225; ... 390  
 Greenfield v Greenfield (1979) 38 P & C R 570 ... 199, **211–12**  
 Greenmanor Ltd v Pilford [2012] EWCA Civ 756 ... 155  
 Greenwich LBC v Discreet Selling Estates Ltd [1990] 2 EGLR 65 ... 410  
 Greenwood Reversions Ltd v World Environment Foundations Ltd [2008] EWCA Civ 47 ... 420  
 Greenwood's Agreement, Re [1950] Ch 644 ... 362  
 Griffiths v Williams (1977) 248 EG 947 ... 309  
 Grigsby v Melville [1972] 1 WLR 1355 ... 5, 7, 447

- Grindal v Hooper (1999), *The Times*, 8 February 2000 ... 224
- Guest v Guest [2019] EWHC 869 (Ch) ... 328, 336
- Habberfield v Habberfield [2019] EWCA Civ 890 ... 311, 318, 327–8
- Habib Bank Ltd v Tailor [1982] 1 WLR 1218 ... 583
- Hair v Gillman (2000) 80 P & CR 108 ... 448, 473
- Halifax Building Society v Clark [1973] Ch 307 ... **583**
- Halifax plc v Curry Popeck (a firm) [2008] EWHC 1692 (Ch) ... 71, 75, 554, 594
- Halsall v Brizell [1957] Ch 169 ... **523**, 524–5
- Hammersmith & Fulham LBC v Monk [1992] 1 AC 478 ... **378**
- Hammond v Mitchell [1991] 1 WLR 1127 ... 265, 267
- Hampstead Garden Suburb Institute, Re (1995) 93 LGR 470 ... 282
- Hanning v Top Deck Travel Group Ltd [1993] NPC 73 CA ... 481
- Harmer v Jumbil (Nigeria) Tin Areas Ltd [1921] 1 Ch 200 ... 387, 389
- Harris v Flower (1904) 74 LJ Ch 127 ... 450–4
- Harris v Goddard [1983] 3 All ER 242 ... 197, 199–200, **201–2**
- Harrow LBC v Qazi [2004] 1 AC 983 ... 617–18, 620–2, 625
- Harvey v Pratt [1965] 1 WLR 1025 ... 356
- Hawkesley v May [1956] 1 QB 304 ... 207
- Hawkins v Rutter [1892] 1 QB 668 ... 436
- Haywood v Brunswick Permanent Benefit Building Society (1881) 8 QBD 403 ... 528
- H.E. Dibble Ltd v Moore [1970] 2 QB 181 ... 20
- Healing Research Trustee Co, Re [1992] 2 All ER 481 ... 396
- Hellawell v Eastwood (1851) 155 ER 554 ... 21–2
- Henry v Henry [2010] UKPC 3 ... 318, 320–1, 324
- Henderson v Hendrix [2015] EWHC 3469 (Ch) ... 213
- Hepworth v Hepworth (1870) LR 11 Eq 10 ... 250
- Herbert v Doyle [2010] EWCA Civ 1095 ... 306–7
- Heslop v Burns [1974] 1 WLR 1241 ... 354, 366
- Hewett v First Plus Financial Group plc [2010] EWCA Civ 312 ... 565
- Hibbert v McKiernan [1948] 2 KB 142 ... 13
- Higgs v Leshel Maryas Investment Co. [2009] UKPC 47 ... 167
- Hill v Barclay (1811) 18 Ves 56 ... 425
- Hill v Rosser [1997] EWCA Civ 2187 ... 479
- Hill v Tupper (1863) 2 H & C 122 ... 438–9, 442
- Hillman v Rogers [1998] SLRYB159 ... 468
- Hindcastle Ltd v Barbara Attenborough & Associates Ltd [1997] AC 70 ... 395
- Hodgson v Marks [1971] EWCA Civ 8 ... 106
- Holland v Hodgson (1872) LR 7 CP 328 ... **17–18**, 19–20
- Holliday, Re [1981] 1 Ch 405 ... 235, 237–8
- Hopkins Lease, Re [1972] 1 WLR 372 ... 362
- Hopper v Hopper [2008] EWHC 228 (Ch) ... 221
- Horrocks v Forray [1976] 1 WLR 230 ... 285
- Horsford v Horsford [2020] EWHC 584 (Ch) ... 305, 311
- Horsham Properties Group Ltd v Clark [2008] EWHC 2327 (Ch); [2009] 1 WLR 1255 ... 582, 588, 593, 628
- Hosking v Michaelides [2004] All ER (D) 147 ... 235
- Hounslow v Minchinton (1997) 74 P & CR 221 ... 165, 170
- Hounslow LBC v Pilling [1993] 1 WLR 1242 ... 377
- Hounslow LBC v Powell [2011] 2 AC 186 ... 617–18, 622, 624–5, 627
- Hounslow LBC v Twickenham Garden Developments Ltd [1971] Ch 233 ... 283, 288–9
- Howard v Fanshawe [1895] 2 Ch 581 ... 414
- Howe v Gossop [2021] EWHC 637 (Ch) ... 306–7
- Hoyl Group v Cromer Town Council [2015] EWCA Civ 782 ... 321
- HSBC Bank plc v Dyche [2009] EWHC 2954 (Ch) ... 84
- Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd [1987] AC 99 ... 399
- Huang v Secretary of State for the Home Department [2007] 2 AC 167 ... 613
- Huckvale v Aegean Hotels Ltd [1989] 58 P & CR 163 ... 494
- Hughes v Incumbent of the benefice of Frampton-on-Severn, Arlingham, Saul, Fretherne & Framilode [2021] UKUT 184 (LC) ... 483
- Hunt v Luck [1902] 1 Ch 428 ... 39, 104, 140, 142
- Hunter v Babbage (1995) 69 P & CR 548 ... 210–11
- Hunter v Canary Wharf [1997] UKHL 14 ... 355
- Hurst v Picture Theatres Ltd [1915] 1 KB 1 ... 283, 286, 288
- Hussein v Mehman [1992] 2 EGLR 87 ... 379
- Hutchison v B & DF Ltd [2008] EWHC 2286 (Ch) ... 365



- Hypo-Mortgage Services Ltd v Robinson [1997] 2 FLR 71 ... 102–3
- IAM Group plc v Chowdrey (2012) EWCA Civ 505 ... **175–6**
- In The Matter Of Hamden Homes Ltd (2002) Lands Tribunal (N J Rose) LTL 30/1/2002 ... 539
- Industrial Properties Ltd v Associated Electrical Industries Ltd [1977] 2 All ER 293 ... 377
- Inglewood v Baker [2002] EWCA 1733 ... 154, 165
- Ingram v IRC [1997] 4 All ER 395 ... 382
- Inland Revenue Commissioners v Gribble [1913] 3 KB 212 ... 39, 140
- International Tea Stores Co. v Hobbs [1903] 2 Ch 165 ... 470
- Inwards v Baker [1965] 2 QB 29 ... 281, 289, 301, 318, 331
- Islington LBC v Green [2005] EWCA Civ 56 ... 369
- Ivin v Blake [1993] EWCA Civ J0525-4 ... 269
- J. A. Pye (Oxford) Ltd v Graham [2002] UKHL 30; [2003] 1 AC 419 ... 149, 150–2, **153**, 156, 158, 160–5
- J. Alston & Sons Ltd v BOCM Pauls Ltd [2009] 1 EGLR 93 ... 160
- J. Sainsbury plc v Enfield LBC [1989] 1 WLR 590 ... 520
- Jaggard v Sawyer [1995] 2 All ER 189 ... 539
- James v Evans [2000] 3 EGLR 1 ... 366
- James v James [2018] EWHC 43 (Ch) ... 315, 317
- James v Thomas [2007] EWCA Civ 1212 ... 265
- James Jones v Earl of Tankerville [1909] 2 Ch 440 ... 281–2
- Javad v Mohammed Aqil [1991] 1 All ER 243 ... **364–5**, 366, 377
- Jelbert v Davies [1968] 1 WLR 589 ... 496
- Jennings v Rice [2002] EWCA Civ 159; [2003] 1 P & CR 8 ... 308, 318, **323**, 324, 326–8, 336
- Jeune v Queens Cross Properties Ltd [1974] Ch 97 ... 426
- John Betts & Sons Ltd v Price (1924) 40 TLR 589 ... 402
- Jones v Challenger [1960] 2 WLR 695 ... 216, **224–5**, 226
- Jones v Cleanthi [2007] 1 WLR 1604 ... 494
- Jones v Herxheimer [1950] 2 QB 106 ... 425
- Jones v Jones [1977] 1 WLR 438 ... 225
- Jones v Kernott [2011] UKSC 53 ... 195, 246, 251–6, 259–60, **261–2**, 263, 269–73, 275–6, 334
- Jones v Morgan [2001] EWCA Civ 995 ... 555, 557, 559
- Jones v Price [1965] 2 QB 618 ... 444–6
- Jones (AE) v Jones (FW) [1977] 1 WLR 438 ... 331
- Joyce v Epsom & Ewell Borough Council [2012] EWCA Civ 1398 ... 321, 485
- K (deceased), Re [1985] Ch 85 ... 195, 212, 213
- Kammins Ballroom Co. v Zenith Instruments Ltd [1971] 1 WLR 1751 ... 308
- Kay v Lambeth LBC [2006] 2 AC 465 ... 369, 620–2, 624
- Kelly v Purvis (1983) 1 All ER 525 ... 417
- Kelsen v Imperial Tobacco Co. [1957] 2 QB 334 ... 6
- Kelsey v Dodd (1881) 52 LJ Ch 34 ... 510
- Kennedy v Secretary of State for Wales [1996] 1 PLR 97 ... 23, 25
- Kennerley v Beech [2012] EWCA Civ 158 ... 437
- Kennet Properties Ltd Application, Re (1996) 72 P & CR 353 ... 538
- Kenny v Preen [1963] 1 QB 499 ... 388
- Kensington Mortgage v Mallon [2019] EWHC 2512 ... 333
- Kent v Kavanagh [2007] Ch 1 ... 470
- Kettel v Bloomfold Ltd [2012] EWHC 1422 (Ch) ... 449–50, 501
- Kilgour v Gaddes [1904] 1 KB 457 (CA) ... 478
- Kinane v Alimamy Mackie-Conteh [2005] EWCA Civ 45 ... 553
- Kinch v Bullard [1999] 1 WLR 423 ... 199, **203**
- King, Re [1963] Ch 459 ... 395, 405
- King v David Allen & Sons Billposting Ltd [1916] 2 AC 54 ... 281, 292–3, 297, 299
- King & Blair v The Incumbent of Newburn [2019] UKUT 176 (LC) ... 164
- Kingsgate Development Projects Ltd v Jordan [2017] EWHC 343 (TCC) ... 493
- Kingsnorth Finance Co. Ltd v Tizard [1986] 1 WLR 783 ... 39, 130, 138, **141–2**, 143, 239
- Kirkbright v Toseva [2021] EWHC 2320 (TCC) ... 313–14
- Kling v Keston Properties Ltd (1983) 49 P & CR 212 ... 101
- Knight v Fernley [2021] EWHC 1343 (Ch) ... 111
- Knightsbridge Estates Ltd v Byrne [1939] Ch 441 ... 556
- Kreglinger v New Patagonia Meat and Cold Meat Storage Co. Ltd [1914] AC 25 ... 548, **557–8**
- Kumar v Dunning [1989] 1 QB 193 ... 399, 534
- Kynoch Ltd v Rowlands [1912] 1 Ch 527 ... 153

- Lace v Chantler [1944] KB 368 ... 357, 358–60
- Laiqat v Majid [2005] EWHC 1305 (QB) ... 6
- Lake v Craddock (1732) 3 P Wms 158 ... 195
- Lambeth LBC v Blackburn (2001) 33 JLR 74 ... 161, 164
- Lambeth London Borough Council v Bigden [2000] EWCA Civ 302 ... 168
- Laskar v Laskar [2008] 1 WLR 2695 ... 249–53, 271
- Lavender v Betts [1942] 2 All ER 72 ... 388
- Layton v Martin [1986] 2 FLR 227 ... 312
- Le Foe v Le Foe [2001] 2 FLR 970 ... 269
- Leake (formerly Bruzzi) v Bruzzi [1974] 1 WLR 1528 ... 193
- Lee v Lee [2018] EWHC 149 (Ch) ... 203
- Lee v Leeds City Council [2002] EWCA Civ 6 ... 390
- Leeds City Council v Price [2006] 2 AC 465 ... 618, 620–2, 624
- Leeds Permanent Building Society v Famini (1998), unreported ... 560
- Lee-Parker v Izzet [1971] 1 WLR 1688 ... 426
- Leigh v Taylor [1902] AC 157 ... 20, 22–4, 26
- Lemmon v Webb [1895] AC 1 ... 6
- Lester v Woodgate [2010] EWCA Civ 199 ... 495
- Lewis v Meredith [1913] 1 Ch 571 ... 470
- Liden v Burton [2016] EWCA Civ 275 ... 310
- Link Lending v Bustard [2010] EWCA Civ 424 ... 94, 96, 98, 99–101
- Linpac Mouldings Ltd v Aviva [2010] EWCA Civ 395 ... 386
- Littledale v Liverpool College [1900] 1 Ch 19 ... 162, 165
- Liverpool City Council v Irwin [1977] AC 239 ... 389, 445, 446
- Liverpool Corp. v H. Coghill and Son Ltd [1918] 1 Ch 307 (Ch D) ... 479
- Lizzimore v Downing [2003] 2 FLR 308 ... 312
- Llewellyn v Lorey [2011] EWCA Civ 37 ... 478
- Lloyd v Dugdale [2001] 2 P & CR 13 ... 77–9, 94, 299, 317–18
- Lloyds Bank v Rosset [1989] Ch 350; [1990] 1 AC 107 ... 100–2, 104, 256, 263–4, 265, 268–9, 271–2
- Lloyds Bank plc v Byrne and Byrne [1991] Ch 142 ... 228
- Lloyds Bank plc v Carrick [1996] 4 All ER 630 ... 137, 333
- London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd [1994] 1 WLR 31 ... 436, 439, 448
- London and South Western Railway v Gomm (1882) 20 Ch D 562 ... 530
- London CC v Allen [1914] 3 KB 642 ... 528, 530
- London County and Westminster Bank Ltd v Tompkins [1918] 1 KB 515 ... 546
- London Diocesan Fund v Avonridge Property Company Ltd [2005] 1 WLR 236 ... 406
- London Tara Hotel Ltd v Kensington Close Hotel Ltd [2011] EWCA Civ 1356 ... 480
- Long v Gowlett [1923] 2 Ch 177 ... 473
- Long v Tower Hamlets LBC [1998] Ch 197 ... 370
- Lord Advocate v Lord Lovat (1880) 5 App Cas 273 ... 155
- Lord Chesterfield v Harris [1908] 1 Ch 230 ... 498
- Lord Chesterfield's Settled Estates, Re [1911] 1 Ch 237 ... 23, 25
- Lund v Taylor (1975) 31 P & CR 16 ... 536
- Luttrell's Case (1601) 4 Co Rep 86a ... 496
- Lyus v Prowsa [1982] 1 WLR 1044 ... 77–8, 79, 299
- Macepark (Whittleberry) Ltd v Sargeant (No. 2) [2003] 1 WLR 2284 ... 452
- Mack v Lockwood [2009] EWHC 1524 (Ch) ... 213
- MacLeod v Gold Harp Properties [2014] EWCA Civ 1084 ... 114–15
- Malayan Credit Ltd v Jack Chia-MPH Ltd [1986] AC 549 (PC) ... 197
- Malory Enterprises Ltd v Cheshire Homes (UK) Ltd [2002] Ch 216 ... 63, 68, 94, 100–1, 112
- Mancetter Developments v Garmanson Ltd [1986] 1 QB 1212 ... 27, 387, 392
- Manchester Airport plc v Dutton [2000] QB 133 ... 290, 291–2, 302
- Manchester City Council v Pinnock [2010] UKSC 45; [2011] 2 AC 104 ... 298, 603–4, 618, 622–3, 624–7
- Manchester Ship Canal Co. Ltd v Vauxhall Motors Ltd [2019] UKSC 46 ... 302
- Manjang v Drammeh (1991) 61 P & CR 194 ... 459
- Mann v Stephens (1846) 15 Sim 377 (Ch) ... 527
- Mannai Investment Co. Ltd v Eagle Star Life Assurance Co. Ltd [1997] UKHL 19 ... 377
- Marchant v Charters [1977] 1 WLR 1181 ... 346
- Margerison v Bates [2008] EWHC 1211 (Ch) ... 519
- Markou v De Silvaesa [1986] EWCA Civ 1 ... 345, 346, 350
- Marlborough Park Services Ltd v Rowe [2006] EWCA Civ 436 ... 390
- Marquess of Zetland v Driver [1939] Ch 1 ... 516



- Marr v Collie [2017] UKPC 17 ... 252–3, 254, 271
- Marsden v Miller (1992) 64 P & CR 239 ... 155
- Marshall v Berridge [1881] 19 Ch D 233 ... 355
- Marshall v Taylor [1895] 1 Ch 641 ... 163
- Marten v Flight Refuelling Ltd [1962] 1 Ch 115 ... 517, 530
- Martin v Roe (1857) 7 E & B 237 ... 27
- Maryland Estates v Joseph [1998] EWCA Civ 693 ... 413
- Mason v Clarke [1955] AC 778 ... 374
- Matharu v Matharu (1994) 26 HLR 648 ... 328–9
- Matthews v Smallwood [1910] 1 Ch 777 ... 410
- Matures v Westwood (1598) Cro Eliz 599 ... 399
- Mayo, Re [1943] Ch 302 ... 226
- Mayor of London v Hall and others [2010] EWCA Civ 817 ... 291
- McAdams Homes Ltd v Robinson [2005] 1 P & CR 520 ... 496, **497**, 498
- McDonald v McDonald [2016] UKSC 28; [2016] 3 WLR 45 ... 601, **603–5**, 606, 624, 627
- McDowell v Hirschfield Lipson & Rumney and Smith [1992] 2 FLR 126 ... 210
- McFarlane v McFarlane [1972] NI 59 ... 269
- McGrath v Wallis [1995] 2 FLR 114 ... 250
- McMorris v Brown [1999] 1 AC 142 ... 538
- M'Donnell v M'Kinty (1847) 10 ILR 514 ... 152
- M'Dowell v Ulster Bank (1899) 33 ILT 225 ... 12
- Meah v GE Money Home Finance [2013] EWCH 20 (Ch) ... 589
- Medforth v Blake [2000] Ch 86 ... 593
- Mellor v Watkins (1874) LR 9 QB 400 ... 379
- Melluish (Inspector of Taxes) v BMI (No. 3) Ltd [1996] AC 454 ... 19
- Memvale's Securities Ltd's Application, Re (1974) 233 EG 689 ... 538
- Mercantile Credit Co. v Clarke (1996) 71 P & CR D18 ... 590
- Metropolitan Railway Co. v Fowler [1893] AC 416 (HL) ... 7
- Mew v Tristmire [2011] HLR 47 ... 21
- Midland Bank Ltd v Dobson [1986] 1 FLR 171 ... 267
- Midland Bank Ltd v Farmpride Hatcheries Ltd (1980) 260 EG 493 ... 143
- Midland Bank plc v Cooke [1995] 4 All ER 562 ... 249
- Midland Bank Trust Co. v Green [1981] AC 813 ... 39, **134–5**, 136, 139, 145, 489
- Miles v Easter [1933] Ch 611 ... 512–13, 533
- Millman v Ellis (1995) 71 P & CR 158 ... 465, 467–8
- Mills v Silver [1991] Ch 271 ... 482
- Mint v Good [1951] 1 KB 517 ... 387, 391
- Mitchell v Homfray (1881) 8 QBD 587 ... 564
- Moffat v Kazana [1969] 2 QB 152 ... 9–10
- Mohammed v Gomez [2019] UKPC 46 ... 309
- Moncrieff v Jamieson [2007] UKHL 42 ... 448–9
- Montagu's Settlement, Re [1987] Ch 264 ... 39, 140
- Montalto v Popat [2016] EWHC 810 (Ch) ... 262
- Moody v Steggles [1879] 12 Ch D 261 ... 279, 439
- Moore v Moore [2018] EWCA Civ 2669 ... 324, 329
- Moore v Rawson (1824) 3 B & C 332 ... 494
- Morland v Cook (1868) LR 6 Eq 252 ... 528
- Morrells of Oxford Ltd v Oxford United Football Club Ltd [2001] Ch 459 ... 530
- Mortgage Business plc v Green [2013] EWHC 4243 (Ch) ... 569
- Mortgage Corporation v Shaire [2001] 4 All ER 364 ... 227, **228–9**, 230, 232
- Mortgage Express v Lambert [2016] EWCA Civ 555 ... 68, 85
- Moule v Garrett (1872) LR 7 Ex 101 ... 396
- Mounsey v Ismay [1865] EngR 165 ... 440
- Mount Carmel Investments v Peter Thurlow [1988] 3 All ER 129 ... 167
- Mount Cook Land v Hartley [2000] EGCS 26 ... 420
- MRA Engineering, Re (1987) 56 P & CR 1 ... 459
- Mullen v Salford City Council [2010] EWCA Civ 336 ... 626
- Multiservice Bookbinding Ltd v Marden (1979) Ch 84 ... **558**
- Mumford v Ashe [2000] BPIR 389 ... 249
- Murphy v Rayner [2011] EWHC 1 (Ch) ... 322
- National & Provincial Building Society v Lloyd [1996] 1 All ER 630 ... 585
- National Car Parks Ltd v Trinity Development Co. (Banbury) Ltd [2001] EWCA Civ 1686 ... 351
- National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675 ... 380
- National Provincial Bank v Ainsworth [1965] AC 1175 (HL) ... 28, 93, 280, 290, 293–5, 302
- National Provincial Bank Ltd v Hastings Car Mart Ltd [1964] Ch 665 ... 293

- National Trust v White [1987] 1 WLR 907 ... 451
- National Westminster Bank v Hunter [2011] EWHC 3170 (Ch) ... 561
- National Westminster Bank plc v Ashe [2008] 1 WLR 710 ... 168
- National Westminster Bank plc v Malhan [2004] EWHC 847 (Ch) ... 122, 628
- National Westminster Bank plc v Morgan [1985] UKHL 2 ... 564–5
- National Westminster Bank plc v Rushmer [2010] EWHC 554 (Ch); [2010] 2 FLR 362 ... 628
- Neil v Duke of Devonshire (1882) LR 8 HL 135 ... 476
- New Zealand Government Property Corp. v HM & S Ltd [1982] QB 1145 ... 27
- Newton Abbot Co-Operative Society Ltd v Williamson & Treadgold Ltd [1952] 1 Ch 286 ... 533, **534**, 535
- Nicholls v Ely Beet Sugar Factory Ltd (No. 2) [1936] 1 Ch 346 ... 8
- Nicholls v Lan [2007] 1 FLR 744 ... 236–8
- Nickerson v Barraclough [1981] Ch 426 ... 460
- Nielson-Jones v Fedden [1975] Ch 222 ... 202, 207, 210
- Ninian (Deceased), Re [2019] EWHC 297 (Ch) ... 212–13
- Nisbet and Potts' Contract, Re [1906] 1 Ch 386 ... 39, 140, 170
- Noakes v Rice [1902] AC 24 ... 557
- Norris v Checksfield [1991] 1 WLR 1241 ... 354
- Oak Co-operative Building Society v Blackburn [1968] Ch 730 ... 132–3
- Oakley v Boston (1976) QB 270 ... 482
- O'Brien v Robinson [1973] AC 912 ... 390
- Odey v Barber [2007] 3 All ER 543 ... 479
- Odogwu v Vastguide [2009] EWHC 3565 (Ch) ... 112
- Ofulue v Bossert [2008] EWCA 7 ... 167–8, 182–3
- O'Kelly v Davies [2014] EWCA Civ 1606 ... 270
- Oliver Ashworth Ltd v Ballard [2000] Ch 12 ... 367
- Olympic Delivery Authority v Persons Unknown [2012] EWHC 1012 (Ch) ... 279, 291
- Orgee v Orgee [1997] EWCA Civ 2650 ... 312, 322
- Orme v Lyons [2012] EWHC 3308 (Ch) ... **482**
- Ottey v Grundy [2003] EWCA Civ 1176 ... 308
- Oxley v Hiscock [2005] EWCA Civ 546 ... 257, 260, 273, 334
- P. & A. Swift Investments v Combined English Stores Group plc [1989] AC 632 (HL) ... 398, 402, 407, 514, 532
- P. & S. Platt v Crouch [2003] 1 P & CR 18 ... 439, 468, 473–6
- Padden v Bevan Ashford [2012] 1 WLR 1759 ... 570
- Page v Convoy Investments Ltd [2015] EWCA Civ 1061 ... 492
- Palk v Mortgage Services Funding plc [1993] Ch 330 ... 561, 576, 579–80, 590, **591**, 592
- Pallant v Morgan [1953] 1 Ch 43 ... 597
- Palmer, Re [1994] Ch 316 ... 208
- Pankhania v Chandegra [2012] EWCA Civ 1438 ... **193–4**, 248
- Paragon Finance v Pender [2005] EWCA Civ 760 ... 559
- Paragon Finance Ltd v Nash [2002] 1 WLR 685 ... 559
- Park v Kinnear Investments (2012) [2013] EWHC 3617 (Ch) ... 63
- Parker v British Airways Board [1982] QB 1004 ... 5, 10, **11**, 12
- Parker v Housefield (1834) 2 My & K 419 ... 552
- Parker v Roberts [2019] EWCA Civ 121 ... 453
- Parker v Taswell (1858) 2 De Gex & Jones 559 ... 372
- Parker v Webb (1693) 3 Salk 5 ... 399
- Parker-Tweedale v Dunbar Bank (No. 1) [1991] Ch 12 ... 589
- Parshall v Bryans [2013] EWCA Civ 240 ... 160
- Pascoe v Turner [1979] 1 WLR 431 ... 309, 318–19, 329
- Patel v Freddy's Ltd [2017] EWHC 73 (Ch) ... 113–14
- Patel v K. & J. Restaurants Ltd [2010] EWCA Civ 1211 ... 420
- Patel v Mirza [2016] UKSC 42 ... 251
- Paton v Todd [2012] EWHC 1248 (Ch) ... 114
- Pavledes v Ryesbridge Properties Ltd (1989) 58 P. & C.R. 459 ... 161, 168
- Payne v Webb (1874) LR 19 Eq 26 ... 194
- Peacock v Custins [2002] 1 WLR 1815 ... 451–2
- Peckham v Ellison [1998] EWCA Civ 1861 ... 463
- Peffer v Rigg [1977] 1 WLR 285 ... 70, **76**
- Penn v Wilkins (1974) 236 EG 203 ... 473
- Pennell v Payne [1995] QB 192 ... 403
- Pennine Raceway v Kirklees Council [1983] QB 382 ... 331

- Pennistone Holdings Ltd v Rock Ferry Waterfront Trust [2021] EWCA Civ 1029 ... 101
- Perera v Vandiyar [1953] 1 WLR 672 CA ... 388
- Pesticcio v Huet [2004] EWCA Civ 372 ... 568
- Pettitt v Pettitt (1970) AC 777 ... 249–50, 265, 268
- Pettkus v Becker [1980] 2 SCR 834 ... 272
- Philbin v Davies [2018] EWHC 3472 (Ch) ... 590
- Phillips v Mobil Oil Co. Ltd [1989] 1 WLR 888 ... 399
- Phipps v Pears [1965] 1 QB 76 ... 446, 472
- Pickard v Constable [2017] EWHC 2475 (Ch) ... 236
- Pilcher v Rawlins (1872) LR 7 Ch App 259 ... 38, 130, 138–9, 489
- Pillmoor v Miah [2019] EWHC 3696 (Ch) ... 272
- Pineport Ltd v Grange Glen [2016] EWHC 1318 (Ch) ... 414, 422
- Pinewood Estates, Re [1958] Ch 280 ... 534
- Pink v Lawrence (1977) 36 P & CR 98 ... 193–4
- Pinto v Lim [2005] EWHC 630 (Ch) ... 113
- Pitt v Buxton (1970) 21 P & CR 127 ... 457
- Plimmer v Mayor etc. of Wellington (1884) 9 AC 699 ... 289
- Polonski v Lloyds Bank Mortgages Ltd (1997), unreported ... 591, **592**
- Poole's Case (1703) 91 ER 320 ... 19, 27
- Poplar Housing and Regeneration Community Association Ltd v Donoghue [2002] QB 48 ... 604
- Porntip Stallion v Albert Stallion Holdings (Great Britain) Ltd [2009] EWHC 1950 ... 318
- Port of London Authority v Ashmore [2010] EWCA Civ 30 ... 156–7, 161
- Powell v McFarlane [1979] 38 P & CR 452 ... 151–2, 157–8, 161, **162–3**, 164–5
- Powys v Belgrave [1854] 43 ER 582 ... 392
- Predeth v Castle Phillips Finance Co. Ltd [1986] 2 EGLR 144 ... 590
- Procter v Procter [2021] EWCA Civ 167 ... 341
- Prudential Assurance v Waterloo (1999) 17 EG 131 ... 156, 161
- Prudential Assurance Co. Ltd v London Residuary Body [1992] 2 AC 386 ... 288, 356, **358**, 359–62, 377, 383
- Purbrick v London Borough Hackney [2003] EWHC 1871 ... 154, 157
- Putnam v Taylor [2009] EWHC 317 (Ch) ... 628
- Pwllbach Colliery Co. Ltd v Woodman [1915] AC 634 ... 415, 463, 477
- Pyer v Carter (1857) 1 H & N 916 ... 467
- Quaffers Ltd, Re (1988) 56 P & CR 142 ... 538
- Quennell v Maltby [1979] 1 WLR 318 ... **579–80**
- Quick v Taff Ely BC [1986] QB 809 ... 390
- Quigley v Masterson [2011] EWHC 2529 (Ch) ... 202–3
- R v Ahmad [2014] 3 WLR 23 ... 610
- R v Otley, Suffolk (Inhabitants) (1830) 1 B. and Ad. 161 ... 20
- R v Oxfordshire County Council ex p Sunningwell Parish Council [2000] 1 AC 335 ... 477
- R v Smith [1974] QB 354 ... 27
- R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23 ... 602
- R (on the application of Mott) v Environment Agency [2018] UKSC 10 ... 616
- R (on the application of Trailer & Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs [2004] EWCA Civ 1580 ... 616
- Rainbow Estates v Tokenhold [1999] Ch 64 ... 425
- Rains v Buxton (1880) 14 Ch D 537 ... 152
- Ramsden v Dyson [1866] LR 1 HL 129 ... 308–9
- Rance v Elvin (1985) 50 P & CR 9 ... 430, 444
- Rashid v Nasrullah [2018] EWCA Civ 2685 ... 160
- Raval, Re [1998] BPIR 384 ... 236
- Rawlings v Rawlings (1964) P 398 ... 225
- RB's Policies at Lloyd's v Butler [1950] 1 KB 76 ... 147
- Red House Farms (Thorndon) Ltd. Catchpole [1977] 2 EGLR 125 ... 156–7, 161
- Rees v 82 Portland Place [2020] EWHC 1177 (Ch) ... 113
- Rees v Peters [2011] EWCA Civ 836 ... 113
- Reeve v Lisle [1902] AC 461 ... 557
- Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd [2018] UKSC 57 ... 432, 437–8, 440, **441–2**, 443, 445–6
- Regent Oil Co. Ltd v J.A. Gregory (Hatch End) Ltd [1966] Ch 402 ... 530
- Reid v Bickerstaff [1909] 2 Ch 305 ... 536
- Renals v Cowlshaw (1878) 8 Ch D 125 ... 516, 534
- Rhodes v Dalby [1971] 1 WLR 1325 ... 354
- Rhone v Stephens [1994] 2 AC 310 ... 518, 521, 523–5, **529**, 538, 541
- Rickett v Green [1910] 1 KB 253 ... 402

- Roake v Chadha [1984] 1 WLR 40 ... 519, 520
- Robbins v Jones (1863) 15 CBNS 221 ... 389
- Roberts v Swangrove Estates [2007] EWHC 513 (Ch) ... 156–7, 161
- Roberts, Re [1946] Ch 1 ... 250
- Roberts ex parte Brook, Re (1878) 10 Ch D 100 ... 27
- Robertson v Hartropp (1889) 43 Ch D 484 ... 498
- Robinson v Kilvert [1889] 41 Ch D 88 ... 389
- Robson v Hallet [1967] 2 QB 939 ... 281–2
- Rochester Poster Services Ltd v Dartford BC (1991) 63 P & CR 88 ... 373
- Rodway v Landy [2001] Ch 703 ... 220, 223
- Roe v Siddons (1889) LR 22 QB 224 ... 437
- Rogers v Hosegood [1900] 2 Ch 388 ... 512, 514, 516, 520, 534
- Ropaigéalach v Barclays Bank plc [2000] QB 263 ... 579, 581–2
- Ropemaker Properties Ltd v Noonhaven Ltd [1989] 2 EGLR 50 ... 420, 421
- Rose v Hyman [1912] AC 623 ... 420
- Rothschild v Charmaine De Souza [2018] EWHC 1855 (Fam) ... 260
- Royal Bank of Scotland v Etridge (No. 2) [2001] 2 AC 773 ... 561–5, 567–8, 569–71, 573
- Royal Bank of Scotland plc v Chandra [2010] EWHC 105 (Ch) ... 565
- Royal Parks v Bluebird Boats [2021] EWHC 2278 (TCC) ... 19, 21, 23
- Royal Trust Co. of Canada v Markham [1975] 1 WLR 1416 ... 583
- Royal Victoria Pavilion, Ramsgate, Re [1961] Ch 581 ... 518, 530
- RPH Ltd v Mirror Group Newspapers and Mirror Group Holdings [1993] 1 EGLR 74 ... 405
- Rugby School (Governors) v Tannahill [1935] 1 KB 87 ... 417–18
- Russell v Watts (1885) 10 App Cas 590 ... 457
- Rye v Rye [1962] AC 496 ... 472
- Saeed v Plustrade Ltd [2001] EWCA Civ 2011 ... 101
- Saint v Jenner [1973] Ch 275 ... 492
- Salvage Wharf Ltd v G. & S. Brough Ltd [2009] EWCA Civ 21 ... 483
- Samuel v Jarrah Timber & Wood Paving Corporation Ltd [1904] AC 323 ... 557
- Sanderson v Berwick-upon-Tweed Corp. (1884) 13 QBD 547 ... 387–8
- Santley v Wilde [1899] 2 Ch 474 ... 546, 557
- Sarson v Roberts [1895] 2 QB 395 ... 389
- Sava v SS Global Ltd [2008] EWCA Civ 1308 ... 158, 167
- Savva v Hussein (1997) 73 P & CR 150 ... 417–18, 419
- Say v Smith (1563) 1 Plowden 269 ... 356, 358
- Scala House & District Property Co. Ltd v Forbes [1974] QB 575 ... 415–18
- Scarle v Scarle [2019] EWHC 2224 (Ch) ... 190
- Schwann v Cotton [1916] 2 Ch 120 ... 444
- Scott v Southern Pacific Mortgages Ltd [2014] UKSC 52 ... 93, 102
- Scottish and Newcastle Plc v Lancashire Mortgage Corp. Ltd [2007] EWCA Civ 684 ... 309
- Scribes West Ltd v Relsa Anstalt (No. 3) [2004] EWCA Civ 1744 ... 402
- Seddon v Smith (1877) 36 LT 168 ... 154–5, 161, 163
- Segal Securities Ltd v Thoseby [1963] 1 QB 887 ... 410
- Serene Construction Ltd v Salata and Associates Ltd [2021] EWHC 2433 (Ch) ... 590
- Shami v Shami [2012] EWHC 664 (Ch) ... 85
- Sharpe (A Bankrupt), Re [1980] 1 WLR 219 ... 250, 297, 331, 333
- Shaw v Applegate [1977] 1 WLR 970 ... 309
- Shephard v Turner [2006] EWCA Civ 8 ... 538
- Shiloh Spinners Ltd v Harding [1973] AC 691 ... 131–2, 138, 410, 420
- Silven Properties Ltd v Royal Bank of Scotland plc [2003] EWCA Civ 1409 ... 576, 590, 593
- Simmons v Dobson [1991] 1 WLR 720 ... 478
- Sims v Dacorum Borough Council [2014] UKSC 63 ... 378
- Singla v Brown [2007] EWHC 405 (Ch) ... 198
- Sir Thomas Spencer Wells, Re [1933] Ch 29 ... 555
- Skipton Building Society v Stott (2000) 2 All ER 779 ... 590
- Sledmore v Dalby (1996) 72 P & CR 196 ... 318, 320, 329
- Small v Oliver & Saunders [2006] EWHC 1293 ... 516
- Smith v Bottomley (2013) EWCA Civ 953 ... 265
- Smith v City Petroleum [1940] 1 All ER 260 ... 27
- Smith v Cooper [2010] EWCA Civ 722 ... 568
- Smith v Marrable (1843) 11 M & W 5 ... 389
- Smith v Muscat [2003] EWCA Civ 962 ... 424
- Smith v Seghill Overseers (1875) LR 10 QB 422 ... 354

- Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board [1949] 2 KB 500 . . . 510, 514–15, 532
- Smoke Club Ltd and others v Network Rail Infrastructure Limited [2021] UKUT 0078 . . . 366
- Smyth-Tyrrell and another v Bowden [2018] EWHC 106 (Ch) . . . 312
- Solomon (A Bankrupt), Re [1967] Ch 573 . . . 234, 293–4
- Solomon v McCarthy [2020] 1 P & CR DG 22 . . . 224
- Somma v Hazlehurst [1978] 1 WLR 1014 . . . 349–50
- Sommer v Sweet [2005] EWCA Civ 227 . . . 328
- South Staffordshire Water Co. v Sharman [1896], 2 QB 44 . . . 11
- Southend-on-Sea BC v Armour [2014] HLR 23 . . . 626
- Southward Housing Co-Operative Ltd v Walker [2015] EWHC 1615 (Ch); [2016] Ch 443 . . . 361
- Southwark LBC v Ludgate House [2020] EWCA Civ 1637 . . . 345, 351–3
- Southwark LBC v Mills [1999] 3 WLR 939 . . . 388–9
- Southwell v Blackburn [2014] EWCA Civ 1347; [2015] 2 FLR 1240 . . . 285, 312, 318, **320–1**, 333–4
- Sovmots Investments Ltd v Secretary of State for the Environment [1979] AC 144 . . . 465, 473
- Spencer's Case (1583) 5 Co Rep 16a . . . 398–400, 402
- Spielplatz Ltd v Pearson [2015] EWCA Civ 804 . . . 21
- Springette v Defoe [1993] 24 HLR 552 . . . 249, 265
- Spyer v Phillipson [1931] 2 Ch 183 . . . 23, 27
- St Marylebone Property Co. Ltd v Fairweather [1963] AC 510 . . . 147, 169
- Stack v Dowden [2007] 2 AC 432 . . . 195, 246, 248–9, 251–4, 256, **257–8**, 259–60, 263, 265, 268–9, 271, 273, 275–6, 333–4
- Stafford v Lee (1993) 63 P & CR 172 . . . **462**, 463
- Standard Property Investments plc v British Plastic Federation (1985) 53 P & CR 25 . . . 133
- Stannard v Issa [1987] AC 175 . . . 538
- Stanning v Baldwin [2019] EWHC 1350 (Ch) . . . 497
- State Bank of India v Sood [1997] Ch 276 . . . 85, 594
- Stein v Stein (2004), unreported . . . 110
- Stevens v Newey [2005] EWCA Civ 50 . . . 563
- Stillwell v Simpson (1983) 133 NLJ 894 . . . 317
- Stilwell v Blackman [1968] Ch 508 . . . 534
- Stockholm Finance Ltd v Garden Holdings Inc [1995] NPC 162 . . . 98–9
- Strachey v Ramage [2008] EWCA Civ 384 . . . 167
- Strand Securities v Caswell [1965] Ch 958 . . . 76, 92, 101–2
- Street v Mountford [1985] AC 809 . . . 32, 299, 342–3, **344**, 345, 349–51, 354, 362–3, 370
- Stuart v Joy [1904] 1 KB 362 . . . 395
- Stukeley v Butler (1615) 80 ER 316 . . . 5, 8
- Suffield v Brown [1864] EngR 129 . . . 466
- Sugarman v Porter [2006] EWHC 331 . . . 514
- Suggitt v Suggitt [2012] EWCA Civ 1140 . . . 318, 336
- Swan v Sinclair [1924] 1 Ch 254 . . . 494
- Sweet v Sommer [2004] EWHC 1504 (Ch) . . . 459, **460**, 463, 485
- Swift v Macbean [1942] 1 KB 375 . . . 356
- Swift 1st v Chief Land Registrar [2015] EWCA Civ 330; [2015] Ch 602 . . . 63, 68–9, 112, 116
- Swiss Bank Corp. v Lloyds Bank Ltd [1982] AC 584 . . . 553
- Tanner v Tanner [1975] 1 WLR 1346 . . . **284–5**, 288
- Target Home Loans Ltd v Clothier [1994] 1 All ER 439 . . . 585
- Taylor v Dickens [1998] 1 FLR 806 . . . 314
- Taylor v Webb [1937] 2 KB 283 . . . 19
- Taylor's Fashions Ltd v Liverpool Victoria Trustees Co. Ltd [1982] QB 133 . . . 136, 308, 319–21, 335
- Tecbild Ltd v Chamberlain (1969) 20 P & CR 633 . . . 156, 165
- Tehidy Minerals Ltd v Norman [1971] 2 QB 528 . . . 481–2, 494
- Telchadder v Wickland Holdings Ltd [2014] UKSC 57 . . . 419
- Tennant v Adamczyk [2005] EWCA Civ 1239 . . . 161
- Texaco v Mulberry Filling Station [1972] 1 All ER 513 . . . 556
- Thames Manufacturing Co. Ltd v Perrots Ltd (1985) 50 P & CR 1 . . . 405
- Thamesmead Town Ltd v Allotey (2000) 79 P & CR 557 . . . 522, **524**
- Thatcher v Douglas (1996) 146 NLJ 282 . . . 490
- Thomas v Clydesdale Bank plc [2010] EWHC 2755 (Ch) . . . 100, 102, 106
- Thomas v Hayward (1869) LR 4 Exch 311 . . . 399
- Thomas v Sorrell (1673) Vaughan 330 . . . 280
- Thomas Guaranty Ltd v Campbell [1985] QB 210 . . . 552
- Thompson v Foy [2010] 1 P & CR 16 . . . 94, 96, 99–103, 106–7
- Thompson v Hurst [2014] EWCA Civ 1752 . . . 255

- Thompson v Park [1944] KB 408 . . . 289
- Thompson v Thompson [2018] EWHC 1338 (Ch) . . . 312
- Thorner v Major [2009] 1 WLR 776 . . . 305, 307–8, **310**, 311, 313, 315
- Thorpe v Frank [2019] EWCA Civ 150 . . . 155–6, 161
- Timbo v Lambeth LBC [2019] EWHC 1396 (Ch) . . . 414
- Timothy Taylor Ltd v Mayfair House Corp. [2016] EWHC 1075 (Ch) . . . 388
- Tinsley v Milligan [1994] 1 AC 340 . . . 250–1
- Titchmarsh v Royston Water Co. Ltd (1899) 81 LT 673 . . . 459
- Tito v Waddell (No. 2) [1977] 1 Ch 106 . . . 523
- Toomes v Conset (1745) 3 Atk 261 . . . 557
- Total Oil Great Britain Ltd v Thompson Garages [1972] 1 QB 318 . . . 379
- Tower Hamlets LBC v Barrett [2005] EWCA Civ 923 . . . 161
- Tower Hamlets LBC v Bromley LBC [2015] EWHC 1954 (Ch) . . . 20, 21, 23, 25
- Treloar v Nute [1976] 1 WLR 1295 . . . 158, 161
- Trevallion v Watmore and another [2016] EWLandRA 2015\_0295 . . . 94, 106
- Truman Hanbury Buxton & Co. Ltd's Application, Re [1956] 1 QB 261 . . . 538
- TSB Bank plc v Camfield [1995] 1 WLR 430 . . . **572**, 573
- Tse Kwong Lam v Wong Chit Sen [1983] 1 WLR 1349 . . . 590–1
- Tulk v Moxhay (1848) 2 Ph 774 . . . 402–3, 409, **527**, 528, 531
- Turkey v Awadh [2005] EWCA Civ 382 . . . 563, **566–7**
- Uddin & Another v Islington LBC [2015] EWCA Civ 369 . . . 390
- Uglo v Uglo [2004] EWCA Civ 987 . . . 314
- Union Lighterage Co. v London Graving Dock Co. [1902] 2 Ch 557 . . . 459, 479
- United Bank of Kuwait v Sahib [1997] Ch 107 . . . 333, 552
- University of Westminster, Re [1998] 3 All ER 1014 . . . 538–9
- Vaudeville Electric Cinema v Muriset [1923] 2 Ch 74 . . . 23, 25
- Verrall v Great Yarmouth Borough Council [1981] QB 202 . . . 286, 288–9
- Virdi v Chana [2008] EWHC 2901 . . . 430, 449–50, 501
- Viscount Hill v Bullock [1897] 2 Ch 55 . . . 24
- W v M (TOLATA Proceedings: Anonymity) [2012] EWHC 1679 (Fam) . . . 222
- Walby v Walby [2012] EWHC 3089 . . . 459, 477
- Walker v Burton [2013] EWCA Civ 1228 . . . 62, **63**, 113
- Wall v Collins [2007] Ch 390 . . . 500
- Wallace v Manchester City Council [1998] EWCA Civ 1166 . . . 426
- Wallbank v Price [2007] EWHC 3001 (Ch) . . . 210
- Wallis's Cayton Bay Holiday Camp Ltd v Shell Mex & BP Ltd [1975] QB 94 . . . **158–9**
- Walsh v Lonsdale (1882) 21 Ch D 9 . . . 372, **373**, 374–5, 486, 552
- Walsh v Sligo County Council [2010] IEHC 437 . . . 478
- Walsingham's Case (1573) 2 Plowd 547 . . . 31
- Walton v Walton (1994), 14 April 1994, unreported . . . 312
- Wandsworth LBC v Michalak [2003] 1 WLR 617 . . . 626
- Ward v Kirkland [1967] Ch 194 . . . **467**, 484
- Warming v Miller [1973] QB 877 . . . 373–4
- Warren v Gurney [1944] 2 All ER 472 . . . 250
- Warren v Keen [1954] 1 QB 15 . . . 387, 392
- Watts v Stewart [2016] EWCA Civ 1247 . . . 343, 345, 347
- Watts v Storey (1984) 134 NLJ 631 . . . 317
- Waverley Borough Council v Fletcher [1996] QB 334 . . . 9–11, 13
- Wayling v Jones (1993) 69 P & CR 170 . . . 267, 315, **316**, 318, 328–9
- Webb v Austin (1844) 7 Man & G 701 . . . 367
- Webb v Pollmount [1966] Ch 584 . . . 94
- Webb's Lease, Re [1951] Ch 808 . . . 477
- West Bromwich Building Society v Wilkinson [2005] UKHL 44 . . . 576
- Western Bank Ltd v Schindler [1977] Ch 1 . . . 582, 584
- Westminster City Council v Clarke [1992] 2 AC 288 . . . 345–6
- Whaley, Re [1908] 1 Ch 615 . . . 22–3, 25
- Whatman v Gibson (1838) 9 Sim 196 . . . 527
- Wheeldon v Burrows [1879] 12 Ch D 31 . . . 91, 455, 458, 463–9, 472, 474–7, 489, 497, 499–500
- Wheeler v J. J. Saunders [1996] Ch 19 . . . 466
- Wheeler v Mercer [1957] AC 416 . . . 367
- White v Bijou Mansions [1938] Ch 351 . . . 510
- White v City of London Brewery (1889) 42 Ch D 237 . . . 578–80



- White v White [2003] EWCA Civ 924 ... 223–4
- Wilford's Estate, Re (1879) LR 11 Ch D 267 ... 211
- Wilkes v Spooner [1911] 2 KB 473 ... 39, 143
- Wilkinson v Kerdene Ltd [2013] EWCA Civ 44 ... 525
- Willers v Joyce (No. 2) [2016] UKSC 44 ... 253
- William Aldred's Case (1610) 9 Co Rep 57b ... 444
- William Brandt v Dunlop Rubber [1905] AC 454 ... 552
- Williams v Hensman (1861) 1 J & H 546 ... 199–200, 204, 207–8, 210, 241
- Williams v Sandy Lane (Chester) Ltd [2006] EWCA Civ 1738 ... 494
- Williams v Williams [1976] 3 WLR 494 ... **225–4**
- Williams & Glyn's Bank v Boland [1981] AC 487 ... 48, 84, 86, 94, **95**, 96, 103–4, 141, 218, 594–5, 597
- Willies-Williams v National Trust [1993] 65 P & CR 359 ... 485
- Willmott v Barber (1880) 15 Ch D 96 ... 308
- Wilson v Wilson [1963] 1 WLR 601 ... 193
- Wiltshire v Cottrell (1853) 1 E & B 674 ... 20
- Winkworth v Edward Baron Development [1986] 1 WLR 1512 ... 107
- Winter Garden Theatre (London) Ltd v Millennium Productions Ltd [1947] 2 All ER 381 ... 283, 286, **287**, 288–9, 293–5
- Wisbech St Mary Parish Council v Lilley [1956] 1 WLR 121 ... 379
- Wiseman v Simpson [1988] 1 All ER 245 ... 189
- Wishart v Credit & Mercantile plc [2015] EWCA Civ 655 ... 596, **597**
- Wong v Beaumont Property Trust Ltd [1965] 1 QB 173 ... 461
- Wood v Leadbitter (1845) 13 M & W 838 ... 284, 286–7, 499
- Wood v Waddington [2015] 2 P & CR 11 ... 466, 468, 473, **474–5**, 476
- Woodall v Clifton [1905] 2 Ch 257 ... 399
- Wretham v Ross [2005] EWHC 1259 (Ch) ... 160
- Wright v Carter [1903] 1 Ch 27 ... 564
- Wright v Macadam [1949] 2 KB 744 ... 430, 447, 450, **470**, 472
- Wrotham Park Estate Co. Ltd v Parkside Homes Ltd [1974] 1 WLR 798 ... 513
- Yaxley v Gotts [2000] 1 Ch 162 ... 305, 328–9
- Yeoman's Row Management Ltd v Cobbe [2008] 1 WLR 1752 ... 305–7, 310, **313**, 314, 319
- Young v Dalgety plc [1987] 1 EGLR 116 ... 27
- Zarb v Parry [2011] EWCA Civ 1306 ... **166–7**, 176
- Zieleniewski v Scheyd [2012] EWCA Civ 247 ... 279

## International

### European Court of Human Rights

- Agneessens v Belgium (1998) 58 DR 63 ... 608
- Antoniades v UK (1989) App No 15434/89 ... 608
- Banér v Sweden (1989) 60 DR 125 App No 11763/85 ... 606, 610
- Bramelid & Malmstrom v Sweden (1982) 29 DR 64 ... 608
- Broniowski v Poland (2005) App No 31443/96 ... 608
- Buckley v UK (1997) 23 EHRR 101 ... 617
- Chapman v UK (2001) 33 EHRR 318 ... 617
- Chassagnou v France (2000) 29 EHRR 615 ... 610
- Connors v UK (2005) 40 EHRR 9 ... 618, 620–1
- Cyprus v Turkey (1976) App No 25781/94 ... 618
- Di Palma v UK [1988] 10 EHRR CD 149 ... 604
- FJM v UK (2018) App No 76202/16 ... 605, 627
- Former King of Greece v Greece (2001) 33 EHRR 21 ... 615
- Gillow v UK (1989) EHRR 335 ... 610, 617–18
- Hatton v UK (2003) 37 EHRR 28 ... 7, 618
- Howard v UK (1987) 9 EHRR CD116 ... 610, 618
- J. A. Pye (Oxford) Ltd v UK (2006) 43 EHRR 3, [2008] 1 EHRR 132 ... 149, 181–3, 609, **611**, 616
- Jahn v Germany (2006) App No 46720/99 ... 615
- James v UK (1986) 8 EHRR 123 ... 606, 612, **614–15**
- Kay v UK (2012) 54 EHRR 30 ... 620–1
- Khatun v UK (1998) 26 EHRR CD212 ... 618
- Kopecky v Slovakia (2005) App No 69012/01 ... 608
- Lithgow v UK (1986) 8 EHRR 329 ... 610
- Marckx v Belgium (1979) 2 EHRR 330 ... 606, 608
- McCann v UK (2008) 47 EHRR 40 ... 620–1
- Niemietz v Germany (1993) App No 13710/88 ... 618
- O'Rourke v UK (1997) App No 39022/97 ... 618
- Pelipenko v Russia (2013) App No 69037/10 ... 626
- Pine Valley Developments v Ireland (1992) 14 EHRR 319 ... 610

Scordino v Italy (2007) 45 EHRR . . . 615  
 Scott v UK (1984) App No 10741/84 . . . 608  
 Smith Kline and French Laboratories Ltd v  
 Netherlands (1990) 66 DR 70 . . . 608  
 Sporrong and Lönnroth v Sweden (1983) 5  
 EHRR 123 . . . 606, 609, **610**, 614  
 Sunday Times v UK (1979) 2 EHRR 245 . . . 619  
 Tre Traktorer Aktiebolag v Sweden [1989]  
 ECHR 15 . . . 608  
 Vrzić v Croatia, App No 43777/13, (2016)  
 HLR 37 . . . 605  
 Wessels-Bergervoet v the Netherlands (1997) App  
 No 34462/97 . . . 608  
 Wood v UK (1997) 24 EHRR CD 69 . . . 604  
 Zehentner v Austria (2011) 52 EHRR 22 . . . 616

#### European Court of Justice

Courage (Ltd) v Crehan [2001] EUECJ  
 C-453/9 . . . 556

#### National Cases

##### Australia

Byrne v Hoare [1965] Qd R 135 . . . 12  
 Graham v K. D. Morris & Sons Pty Ltd [1974] Qd  
 R 1 . . . 6  
 Palumberi v Palumberi (1986) NSW Conv R  
 55 . . . 24  
 Waltons Stores v Maher [1988] HCA 7 . . . 312

##### Canada

Credit Valley Cable TV/FM Ltd v Peel  
 Condominium Corp. No 95 (1980) 107 DLR  
 (3d) 266 . . . 23  
 The Queen in Right of Manitoba and Air Canada, Re  
 [1980] 2 S.C.R. 303 . . . 7

##### Hong Kong

China Field Ltd v Appeal Tribunal (Buildings)  
 (No. 2) [2009] HKEC 1765 (CFA) . . . 478



# Table of Legislation

## Statutes

|   |  |
|---|--|
| Access to Neighbouring Land Act 1992 . . . 484              | s 1 . . . 300, 511                                     |
| Administration of Justice Act 1970                          | s 1(1) . . . 511                                       |
| s 36 . . . 579–86, 588, 591, 598–9                          | s 1(1)(b) . . . 403                                    |
| s 36(1) . . . 583   | s 1(2) . . . 511                                       |
| s 36(2) . . . 583   | s 1(3) . . . 511                                       |
| s 36(3) . . . 585   | Conveyancing Act 1882                                  |
| s 36(4) . . . 586   | s 3 . . . 139  |
| Administration of Justice Act 1973                          | Coronavirus Act 2020 . . . 338                         |
| s 8 . . . 583–4   | Coroners and Justice Act 2009                          |
| Agricultural Holdings Act 1986 . . . 27                     | s 30 . . . 16  |
| s 10 . . . 27   | County Courts Act 1984                                 |
| Agricultural Tenancies Act 1995                             | s 138 . . . 4112                                       |
| s 8 . . . 27  | s 138(2) . . . 413–14                                  |
| Bankruptcy Act 1914 . . . 208                               | s 138(3) . . . 413                                     |
| Children Act 1989   | s 138(9A) . . . 413–14                                 |
| Sch 1 . . . 285   | s 139(2) . . . 413                                     |
| Civil Aviation Act 1982                                     | Criminal Law Act 1977 . . . 578                        |
| s 76 . . . 7  | s 6 . . . 182, 582                                     |
| Civil Partnership Act 2004 . . . 245, 275                   | s 6(1) . . . 411                                       |
| s 66 . . . 245  | s 7 . . . 183  |
| Sch 5 . . . 245   | s 12(3)–(5) . . . 183                                  |
| Coal Industry Act 1994                                      | s 12A . . . 183  |
| s 9 . . . 8   | Enterprise Act 2002 . . . 234                          |
| Common Law Procedure Act 1852                               | Equality Act 2010                                      |
| s 210 . . . 412   | s 149 . . . 626  |
| Commonhold and Leasehold Reform Act                         | s 199 . . . 250  |
| 2002 . . . 381, 413   | Family Law Act 1996 . . . 72, 93, 274–5                |
| s 76 . . . 413  | s 30 . . . 218, 275                                    |
| s 166 . . . 413   | s 30(2) . . . 275                                      |
| s 167 . . . 413   | s 30(3) . . . 275                                      |
| Commons Act 2006 . . . 490                                  | s 31(10)(b) . . . 94                                   |
| Pt 1 . . . 91, 490  | s 55 . . . 579, 586                                    |
| Consumer Credit Act 1974                                    | Pt IV . . . 131  |
| s 140A . . . 560  | Family Law (Scotland) Act 2006 . . . 273               |
| Consumer Credit Act 2006 . . . 554                          | Financial Services and Markets Act 2000 . . . 554, 560 |
| s 19 . . . 560  | s 150 . . . 560  |
| s 20 . . . 560  | Forfeiture Act 1982 . . . 199                          |
| Contracts (Rights of Third Parties) Act 1999 . . . 300, 511 | s 1 . . . 212, 214                                     |
|   | s 2 . . . 213–14                                       |
|   | s 2(1) . . . 213                                       |

- s 2(2) ... 213
- s 5 ... 213
- Homes (Fitness for Human Habitation) Act 2018 ... 383, 387, 390, 426–7
  - s 1(4) ... 427
- Housing Act 1980 ... 605
  - s 89(1) ... 605
- Housing Act 1985 ... 90, 371, 377
  - s 609 ... 530
- Housing Act 1988 ... 377
  - s 21 ... 603–4
  - s 21(4) ... 604–5
- Housing Act 2004 ... 427
  - s 2 ... 427
- Human Rights Act 1998 ... 181, 423, 598, 601, 603, 621
  - s 3 ... 598
  - s 3(1) ... 627
  - s 4 ... 605
  - s 6 ... 361, 604
  - s 6(1) ... 603
- Infrastructure Act 2015 ... 8
- Inheritance (Provision for Family and Dependents) Act 1975 ... 316
- Insolvency Act 1986 ... 208, 233
  - s 278 ... 208
  - s 283 ... 208, 234
  - s 283A ... 234
  - s 305(2) ... 234
  - s 306 ... 208, 234
  - s 335A ... 233–4, 237–8, 243, 627
  - s 335A(2) ... 233–5
  - s 335A(2)(b)(ii) ... 234
  - s 335A(2)(b)(iii) ... 234
  - s 335A(2)(c) ... 234
  - s 335A(3) ... 233–5, 237–8, 242
  - s 336 ... 237
  - s 337 ... 237
- Judicature Act 1871 ... 402
- Judicature Acts 1873–1875 ... 34, 373
- Land Charges Act 1925 ... 40–1, 126, 134–6
- Land Charges Act 1972 ... 41–3, 60, 126, 128–34, 137–8, 145, 375, 531, 554
  - s 2 ... 130–1, 375
  - s 2(4) ... 595
  - s 2(4)(i) ... 129, 131
  - s 2(4)(iv) ... 131
  - s 2(5) ... 531
  - s 2(5)(ii) ... 138
  - s 2(5)(iii) ... 138, 488
  - s 3(1) ... 132
  - s 4 ... 43, 130, 133, 136, 375
  - s 4(2) ... 134
  - s 4(5) ... 134, 144, 554, 595
  - s 4(6) ... 133, 144, 488, 531
  - s 4(8) ... 134
  - s 10(4) ... 132
  - s 17 ... 134
- Land Registration Act 1925 ... 40–1, 49, 52–4, 62, 71, 76, 78, 80, 87–8, 90, 92, 105, 107–8, 110, 113, 171, 179, 181–2
  - s 3 ... 76
  - s 59 ... 76
  - s 69 ... 63, 68
  - s 70(1)(a) ... 90, 489, 490
  - s 70(1)(g) ... 92–3, 95–6, 104, 106, 264, 331
  - s 70(1)(k) ... 89
  - s 75 ... 179
  - s 75(1) ... 179
  - s 75(2) ... 179
- Land Registration Act 1967 ... 484
- Land Registration Act 1997 ... 49
- Land Registration Act 2002 ... 38–9, 41–4, 46, 48–50, 52–9, 64–7, 71, 76–7, 80, 87–9, 94, 99–100, 110, 117–23, 125–7, 130, 143, 147, 150–1, 169, 171, 177–9, 184, 239, 330, 370–2, 488–9, 397, 531, 549–50, 602
  - s 2 ... 49, 57, 70
  - s 3 ... 43, 57, 59–60, 70, 498
  - s 3(1) ... 60
  - s 3(3) ... 61
  - s 4 ... 57, 59, 61, 70, 88, 551, 595
  - s 4(1) ... 371, 595
  - s 4(1)(d) ... 57
  - s 4(1)(g) ... 550
  - s 6(4) ... 62
  - s 6(5) ... 62
  - s 7 ... 57, 62, 371, 551
  - s 9(4) ... 64
  - s 9(5) ... 64
  - s 10(3) ... 64
  - s 10(6) ... 64

- s 11 ... 88, 170, 595
- s 12 ... 88, 595
- s 23 ... 66, 112, 546
- s 23(1) ... 550–1
- s 24 ... 66
- s 26 ... 66–8, 239–40
- s 26(3) ... 67
- s 27 ... 36, 42, 57, 65, 69–70, 75, 90, 486, 488–9, 499, 551, 594
- s 27(1) ... 57, 65, 371, 550–2
- s 27(2) ... 371
- s 27(2)(d) ... 91, 486
- s 27(2)(f) ... 550, 551–2
- s 28 ... 69–70, 75, 82, 86, 109, 371, 375, 490–1, 531, 554
- s 29 ... 69–72, 75–6, 79, 82, 86, 89–90, 102, 109, 371, 375, 490–1, 531, 551, 554, 594
- s 29(1) ... 69, 71, 108, 531, 594
- s 29(2) ... 69, 108, 531
- s 29(4) ... 69
- s 30 ... 71
- s 32 ... 72, 108
- s 32(3) ... 72
- s 33 ... 56, 58, 72–3, 108
- s 33(b) ... 371
- s 34 ... 73
- s 35 ... 73
- s 35(3) ... 73
- s 36 ... 73
- s 37 ... 73
- s 38 ... 489
- s 40 ... 73, 108
- s 41 ... 74
- s 42(1) ... 74
- s 44 ... 74
- s 48(1) ... 594
- s 50 ... 115
- s 51 ... 551
- s 54 ... 588
- s 58 ... 42, 62–3, 66, 112
- s 58(1) ... 63
- s 58(2) ... 66
- s 60 ... 175
- s 62 ... 64
- s 71 ... 88
- s 73(1) ... 174
- s 73(5) ... 174
- s 73(6) ... 174
- s 73(7) ... 174
- s 96 ... 171
- s 116 ... 85, 94, 298, 301, 331–3
- s 116(a) ... 301
- s 118 ... 90
- s 131 ... 113
- s 132 ... 70, 119
- s 132(1) ... 8, 70
- Sch 1 ... 43, 58, 88–93, 105, 371–2
- Sch 1, paras 1–3 ... 89
- Sch 1, para 1 ... 88, 90
- Sch 1, para 2 ... 88, 94, 103, 170
- Sch 1, para 3 ... 89, 488–9
- Sch 1, para 4 ... 89
- Sch 1, para 5 ... 89
- Sch 1, para 6 ... 89
- Sch 2 ... 57, 65, 70–1, 486
- Sch 2, para 2 ... 489
- Sch 2, para 6(3) ... 485
- Sch 2, para 7(1)(a) ... 485
- Sch 2, para 7(2)(a) ... 489
- Sch 2, para 8 ... 550
- Sch 3 ... 31, 58, 69–70, 75, 86, 88–93, 101, 108–9, 371–2, 594, 597
- Sch 3, paras 1–3 ... 89
- Sch 3, para 1 ... 71–2, 89–90
- Sch 3, para 1A ... 90
- Sch 3, para 2 ... 83, 87, 89–3, 93, 95, 99, 102–5, 108, 142, 239, 375, 490–1, 554
- Sch 3, para 2(a) ... 94
- Sch 3, para 2(b) ... 93, 106
- Sch 3, para 2(c) ... 105–6
- Sch 3, para 2(c)(i) ... 93
- Sch 3, para 2(c)(ii) ... 93
- Sch 3, para 2(d) ... 94
- Sch 3, para 3 ... 89–91, 489–91
- Sch 3, para 4 ... 89
- Sch 3, para 5 ... 89
- Sch 3, para 6 ... 89
- Sch 4 ... 63, 108, 110, 113, 118
- Sch 4, para 1 ... 110–11
- Sch 4, para 2(1) ... 110

- Sch 4, para 3 ... 111  
 Sch 4, para 3(3) ... 114  
 Sch 4, para 5(1) ... 110  
 Sch 4, para 5(1)(d) ... 110  
 Sch 4, para 6 ... 111  
 Sch 4, para 6(3) ... 114  
 Sch 6 ... 111, 119, 146, 150, 169, 171–2, 178, 180–3  
 Sch 6, paras 1–9 ... 169  
 Sch 6, paras 1–4 ... 172  
 Sch 6, para 1 ... 152, 174  
 Sch 6, para 1(1) ... 172  
 Sch 6, para 1(2)(a) ... 172  
 Sch 6, para 1(3) ... 172  
 Sch 6, para 2 ... 173  
 Sch 6, para 2(1) ... 173–4  
 Sch 6, para 4 ... 177  
 Sch 6, para 5 ... 119, 169, 173–4, 177–8  
 Sch 6, para 5(1) ... 174  
 Sch 6, para 5(2) ... 175  
 Sch 6, para 5(3) ... 175  
 Sch 6, para 5(4) ... 119, 175–6  
 Sch 6, para 5(4)(c) ... 176  
 Sch 6, para 6(1) ... 176  
 Sch 6, para 7 ... 176  
 Sch 6, para 8 ... 174  
 Sch 6, para 8(2) ... 172  
 Sch 6, para 9 ... 177  
 Sch 6, para 13 ... 172  
 Sch 8 ... 69, 110, 116  
 Sch 8, para 1 ... 115  
 Sch 8, para 1(1)(a) ... 115  
 Sch 8, para 1(1)(b) ... 116  
 Sch 8, para 1(2)(b) ... 116  
 Sch 8, para 2 ... 117  
 Sch 8, para 5(1)(a) ... 116  
 Sch 8, para 5(1)(b) ... 116  
 Sch 8, para 5(2) ... 116  
 Sch 8, para 6 ... 117  
 Sch 8, para 6(a) ... 117  
 Sch 8, para 6(b) ... 117  
 Sch 8, para 7 ... 117  
 Sch 8, para 8 ... 117  
 Sch 12, para 9 ... 91, 489  
 Sch 12, para 10 ... 490  
 Sch 12, para 18 ... 169, 178  
 Sch 12, para 18(1) ... 180  
 Sch 12, para 20 ... 396  
 Land Registry Act 1862 ... 49  
 Land Transfer Act 1875 ... 49  
 Land Transfer Act 1897 ... 41, 49  
 Landlord and Tenant Act 1927 ... 425  
     s 1 ... 425  
 Landlord and Tenant Act 1954 ... 355, 396  
     s 25 ... 377  
     s 26 ... 377  
     s 30 ... 377  
 Landlord and Tenant Act 1985 ... 340, 370, 387, 390  
     s 9A ... 387, 390, 427  
     s 9A(1) ... 427  
     s 9B ... 427  
     s 9C ... 427  
     s 10 ... 391, 427  
     s 10(2) ... 427  
     s 11 ... 342, 355, 368, 387, 390  
     s 11(3) ... 390  
     s 13 ... 355  
     s 17 ... 426  
 Landlord and Tenant (Covenants) Act 1995 ... 72,  
     394–5, 403–8  
     s 1(1) ... 405  
     s 1(3) ... 405  
     s 3 ... 407  
     s 3(1) ... 407  
     s 3(5) ... 409  
     s 3(6) ... 407, 409  
     s 5 ... 405  
     s 6 ... 405  
     s 8 ... 406, 408  
     s 16 ... 405  
     s 17 ... 397  
     s 18 ... 396–7  
     s 19 ... 397  
     s 24(4) ... 405  
     s 25 ... 406  
     s 28(1) ... 405, 408  
 Law of Property Act 1922  
     s 33 ... 136  
 Law of Property Act 1925 ... 40, 122, 135, 186, 363,  
     398, 549, 586, 602  
 Pt I ... 136

- s 1 ... 31, 35–6, 83, 129, 286, 293, 340–1, 485, 506
- s 1(1) ... 31, 35, 83
- s 1(2) ... 31, 35, 40
- s 1(2)(a) ... 485
- s 1(3) ... 31
- s 1(6) ... 192
- s 2 ... 81–3, 130, 214
- s 2(1) ... 82–3, 85, 137, 594
- s 2(1)(ii) ... 239
- s 2(1)(iii) ... 588
- s 2(2) ... 109, 144
- s 2(3) ... 82, 109, 144
- s 4 ... 293
- s 4(1) ... 293
- s 14 ... 136
- s 27 ... 81–2, 84–5, 109, 122, 130, 137, 144, 214, 239, 594
- s 30 ... 223–5, 227–8, 230
- s 34(2) ... 192
- s 36 ... 200, 204, 208
- s 36(2) ... 192, 197, 199–200, 202, 204, 207–8
- s 40 ... 209, 374
- s 44(1) ... 39
- s 52 ... 305, 307, 372, 401, 456–7, 486
- s 52(1) ... 127, 371, 379, 549, 551–2
- s 52(2) ... 146
- s 52(2)(d) ... 370
- s 53 ... 36, 552
- s 53(1)(b) ... 37, 248
- s 53(1)(c) ... 552
- s 53(2) ... 248, 254, 334–5
- s 54(2) ... 305, 370
- s 56 ... 510–11
- s 56(1) ... 510
- s 62 ... 17, 27, 91, 376, 455, 458, 468–76, 488–9, 499–500, 534
- s 62(4) ... 473
- s 63 ... 574
- s 63(1) ... 206, 573–4
- s 77 ... 396
- s 78 ... 514–15, 517–20, 532–3
- s 78(1) ... 515, 518
- s 79 ... 518–19, 530–1
- s 84 ... 539, 542
- s 84(1) ... 538
- s 84(1)(a) ... 538–9
- s 84(1)(aa) ... 538–9
- s 84(1)(b) ... 538
- s 84(1)(c) ... 538
- s 84(1A) ... 538
- s 84(1B) ... 538
- s 84(7) ... 538
- s 85 ... 549
- s 85(1) ... 549
- s 86 ... 549
- s 87 ... 550–1
- s 87(1) ... 549, 578, 598
- s 88 ... 592
- s 88(1) ... 588
- s 88(1)(b) ... 588
- s 91 ... 560–1, 591–3
- s 91(2) ... 592
- s 98 ... 560
- s 99 ... 560
- s 101 ... 587–8, 593
- s 101(1)(i) ... 586–7
- s 101(4) ... 587
- s 103 ... 587, 593
- s 103(i) ... 587
- s 103(ii) ... 587
- s 103(iii) ... 587
- s 104 ... 587–8
- s 104(2) ... 588
- s 105 ... 588
- s 115(1) ... 555
- s 141 ... 395, 398, 400, 402, 407
- s 141(1) ... 398–9
- s 142 ... 398, 400–2, 407
- s 142(1) ... 399
- s 145 ... 362, 396
- s 146 ... 414–19, 422
- s 146(2) ... 415, 419, 421
- s 146(4) ... 415, 421
- s 149 ... 360
- s 149(6) ... 359–62, 382
- s 153 ... 380, 522, 526
- s 184 ... 190
- s 193(4) ... 480
- s 196 ... 202–4
- s 198(1) ... 133, 144

- s 199(1) ... 134
- s 199(1)(ii)(a) ... 39, 140
- s 199(1)(ii)(b) ... 143
- s 205 ... 4
- s 205(1)(ii) ... 82, 472, 549, 551
- s 205(1)(ix) ... 4–5, 8
- s 205(1)(xi) ... 84
- s 205(1)(xvii) ... 342
- s 205(1)(xxi) ... 39, 82, 139
- s 205(1)(xxvii) ... 362–3
- Sch 1 ... 82
- Sch 3 ... 82
- Sch 5 ... 549
- Sch 15, para 1 ... 362
- Sch 25 ... 396
- Law of Property Act 1969
  - s 23 ... 39, 127
  - s 25 ... 133
- Law of Property (Miscellaneous Provisions) Act 1989 ... 374, 552
  - s 1 ... 305, 371, 506, 549
  - s 1(2) ... 36
  - s 2 ... 36, 209, 286, 300, 305–7, 336, 373–4, 486–7, 552–3
  - s 2(5) ... 305
- Leasehold Property (Repairs) Act 1938 ... 422, 424–5
  - s 1(5) ... 422
- Leasehold Reform Act 1967 ... 614–15
  - s 8(3) ... 526
- Legal Aid, Sentencing and Punishment of Offenders Act 2012 ... 183
  - s 144 ... 183–4
- Limitation Act 1980 ... 87, 119, 147, 150–1, 169, 178–81
  - s 8 ... 577
  - s 15 ... 169–71
  - s 15(6) ... 159
  - s 17 ... 169–71
  - s 19 ... 424
  - s 20 ... 577
  - s 20(5) ... 577
  - s 29 ... 166–8
  - s 29(3) ... 168
  - s 30 ... 168
  - Sch 1, para 1 ... 152
  - Sch 1, para 8(4) ... 159
- Local Government Finance Act 1988
  - s 64 ... 352
- Local Government (Miscellaneous Provisions) Act 1976 ... 484
- Localism Act 2011 ... 90
  - s 157 ... 90
- Marriage (Same Sex Couples) Act 2013
  - s 1 ... 245
  - s 11(1) ... 245
- Married Women's Property Act 1882 ... 201
- Matrimonial Causes Act 1973 ... 201, 245, 273
  - s 23 ... 245
  - s 24 ... 201, 245
  - s 24(1)(a) ... 202
  - s 24(1)(b) ... 202
  - s 24A ... 245
  - s 25 ... 245
- Matrimonial Homes Act 1983 ... 586
- Mental Health Act 1983 ... 98
- Mobile Homes Act 1983 ... 419
- National Health Service Act 1977 ... 220
- Party Wall etc. Act 1996 ... 484
- Petroleum Act 1998
  - s 2 ... 8
- Prescription Act 1832 ... 481, 483–4, 499
  - s 2 ... 483
  - s 3 ... 483
- Protection from Eviction Act 1977 ... 578
  - s 1 ... 411
  - s 2 ... 411
  - s 3 ... 376
  - s 5(1)(b) ... 377
- Rent Act 1977 ... 18, 354, 377
  - Sch 1, para 2 ... 627
- Rent Acts ... 342, 344, 349, 351, 362
- Settled Land Act 1925 ... 82, 94
- Statute of Uses ... 293
- Statute of Westminster 1275 ... 481
- Supreme Court Act 1981
  - s 37(1) ... 593
- Tenant Fees Act 2019 ... 380, 383
- Tenures Abolition Act 1660 ... 30
- Treasure Act 1996 ... 5, 10, 13–14
  - s 1 ... 14–15
  - s 2 ... 14

- s 2(1) ... 14
- s 3 ... 14
- s 3(4) ... 15
- s 4 ... 14–15
- s 8 ... 15
- s 8(1) ... 16
- s 8(3) ... 15
- s 8A ... 16
- s 10 ... 15
- Tribunals, Courts and Enforcement Act 2007
  - Pt 3 ... 424
- Trustee Act 1925 ... 222
- Trustee Act 2000
  - s 8 ... 217
- Trusts of Land and Appointment of Trustees Act 1996 ... 187, 215–16, 226, 207–11, 239, 231, 586
  - s 1 ... 216
  - s 1(2)(b) ... 216
  - s 3 ... 217–18
  - s 4(1) ... 216
  - s 6 ... 217
  - s 6(1) ... 217
  - s 6(3) ... 217
  - s 6(5) ... 217
  - s 6(6) ... 217
  - s 6(9) ... 217
  - s 7 ... 215, 217
  - s 8(1) ... 217
  - s 8(2) ... 217
  - s 9 ... 217
  - s 11 ... 217–18
  - s 11(1)(a) ... 218
  - s 11(1)(b) ... 218
  - s 11(2) ... 217–8
  - s 11(3) ... 218
  - s 12 ... 218–21, 274
  - s 12(1) ... 218
  - s 12(1)(a) ... 218
  - s 12(1)(b) ... 219
  - s 12(2) ... 219
  - s 12(3) ... 219
  - s 13 ... 217, 219–21
  - s 13(1) ... 219
  - s 13(2) ... 219
  - s 13(3) ... 219
  - s 13(4) ... 219
  - s 13(5) ... 219
  - s 13(6) ... 219
  - s 13(7) ... 219
  - s 14 ... 221–2, 224, 227–8, 230, 233–4, 242, 561, 573–4, 627
  - s 14(1) ... 221
  - s 14(2) ... 221
  - s 14(3) ... 222
  - s 15 ... 222–3, 225–30, 232–4, 242, 573–4, 627
  - s 15(1)(a)–(c) ... 226
  - s 15(1)(a) ... 223–4, 228
  - s 15(1)(b) ... 223–4, 228
  - s 15(1)(c) ... 225–6, 229
  - s 15(1)(d) ... 227, 229
  - s 15(3) ... 229
  - s 15(4) ... 233
  - s 16 ... 239–40
  - s 16(1) ... 240
  - s 16(7) ... 240
  - Usury Laws Repeal Act 1854 ... 548
  - War-Time Leases Act 1944 ... 357
  - Water Resources Act 1991
    - s 24 ... 5, 8
    - s 27 ... 5, 8

### Statutory Instruments

- Housing Health and Safety (England) Regulations 2005 (SI 2005/3208) ... 391
- Land Registration Rules 2003 (SI 2003/1417) ... 48, 73
  - r 5(b)(ii) ... 488
  - r 9(a) ... 489
  - r 35 ... 488, 490
  - r 35(1) ... 532, 595
  - r 84 ... 72
  - r 87 ... 73
  - r 189 ... 174
  - Sch 4 ... 74
- Land Registration (Amendment) Rules 2018 (SI 2018/70) ... 48
- Registration of Title Order 1989 (SI 1989/1347) ... 49
- Rules of the Air Regulations 2007 (SI 2007/734)
  - s 3(5) ... 7

Taking Control of Goods Regulations 2013  
 (SI 2013/1894) . . . 424  
   para 4 . . . 424  
   para 5 . . . 424  
 Treasure (Designation) Order 2002 (SI 2002/2666) . . . 14

## National Legislation

### France

Civil Code . . . 466

### United States

Restatement (Second) of Contracts  
   s 90 . . . 312

## International Instruments

European Convention on Human Rights  
 (ECHR) . . . 182, 378, 582, 598, 601, 603–6,  
 617, 627  
   Art 6 . . . 626  
   Art 8 . . . 7, 122, 148, 222, 231, 237–8, 298, 361,  
     378, 598, 603–6, 617–28

Art 8(2) . . . 604, 620  
 Art 10 . . . 626  
 Art 11 . . . 626  
 Art 14 . . . 361, 609, 626–7  
 First Protocol, Art 1 . . . 148, 181–2, 237, 598, 603,  
     605–17, 620, 627–8  
 Seventh Protocol, Art 5 . . . 250  
 Treaty on the Functioning of the European Union  
   Art 101 . . . 556

## Other Materials

Mortgage Conduct of Business Rules . . . 577  
   r 1.2.5 . . . 577  
   r 13.6.1 . . . 577  
   r 13.6.2 . . . 577  
 Pre-Action Protocol for Possession Claims  
   based on  
 Mortgage or Home Purchase Arrears  
   in Respect  
 of Residential Property 2011 . . . 577, 586  
   para 6.2 . . . 586





# 1

## Introduction to Land Law

|   |    |
|---|----|
| 1.1 Introduction  | 1  |
| 1.2 The scope of contemporary land law: What is land law? | 3  |
| 1.3 What is land?   | 4  |
| 1.4 The personal/proprietary divide                       | 28 |
| 1.5 Tenure, estates, and interests in land                | 30 |
| 1.6 The legal/equitable distinction                       | 33 |
| 1.7 Introduction to registered and unregistered land      | 41 |
| 1.8 Bringing it all together: Land law as a puzzle        | 44 |

### 1.1 Introduction

So here we go . . . Welcome to your study of land law. Shake off any preconceptions you might have. Land law is an exciting, rich subject that offers intense rewards to those willing to embrace it. Land law is ‘proper’ law—a perfect amalgam of statute, common law, and policy. It is the site of some of society’s most important developments and helps to answer some of the most fundamental questions: who owns what and whose land is that? It goes to that ancient, essential cry of ‘this is *mine* and not yours’. In short, land law matters because land matters. Land is all around us. It is beneath your feet and all around you right now as you read this. Land is the stage for life’s most pivotal events. It can offer security, safety, and a sanctuary in the form of the family home. Land can equally be the site of division, oppression,<sup>1</sup> deprivation of one’s culture,<sup>2</sup> and violation of human rights.<sup>3</sup> Figure 1.1 muses on why land is so special.

Figure 1.1 captures land’s distinct status which necessitates distinct rules to govern it—this is what we call land law. Let’s unpack its special features:<sup>4</sup>

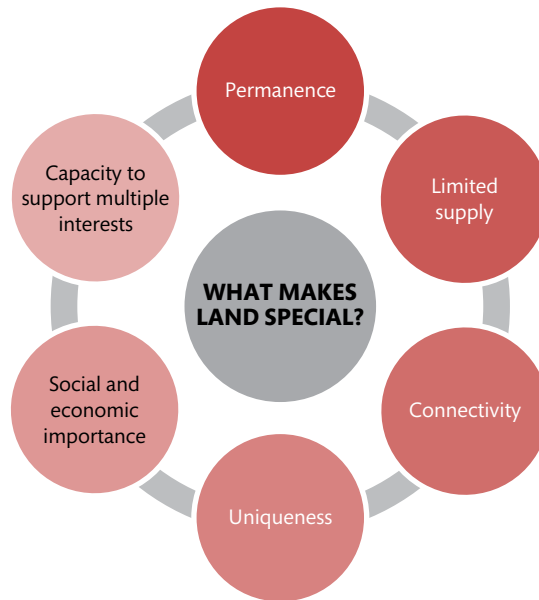
1. **Land is permanent:** Land is fixed. For the most part, it is not going anywhere. This degree of permanence gives land a stability, a durability, and a longevity which means that dealings with it offer a sense of security, long-termism, and commitment. This also explains why investment in land is often seen as a ‘safe option’. A key feature of land’s permanence is our ability to deal with it: we can hold land for ourselves but also pass it on to others for their use or benefit and even to our heirs on death. More than this, we can split the enjoyment of land: for example, you might be the owner of a piece of land but decide to **rent** it out to your neighbour.
2. **Land is in limited supply:** Land is a finite resource. There is only so much of it available. We cannot make more land in the way that, for example, if there is a shortage of cars, we

<sup>1</sup> For a feminist perspective on land law, see amongst others, H. Lim and A. Bottomley (eds), *Feminist Perspectives on Land Law* (Abingdon: Routledge-Cavendish, 2007).

<sup>2</sup> E.g. the land grabs from indigenous peoples around the world.

<sup>3</sup> We explore the relationship between land law and human rights in Chapter 14.

<sup>4</sup> See B. McFarlane, *The Structure of Property Law* (Oxford: Hart, 2008), 7.



**Figure 1.1** The features that make land special

can manufacture more. Limited availability means that land is valuable, expensive, in demand. It means that most of us can only hope to own land with the aid of a **mortgage** from the bank. For land lawyers, the limited supply means land must be freed up, made available, be marketable so that its maximum potential can be realized. We want land to be unlocked, without **encumbrances**, and not overburdened or constrained.<sup>5</sup>

3. **Land is connected:** A parcel of land never exists in isolation. In almost every case, it will be connected to at least one other piece of land, maybe more, and this means that understanding the rights and relationships operating on land often involves considering the rights of adjoining landowners. Interconnectedness and disputes between adjoining plots of land are therefore an unavoidable feature of dealing with land.
4. **Land is unique:** Every piece of land is distinct, a one-off; making it is expensive. Even two apparently identical plots of land are different—each having a unique physical place which no other parcel of land shares. The many property shows on the television where couples seek their ‘perfect home’ are premised on the very idea of land’s uniqueness, that each plot of land has its own magic. The distinctiveness of land can create a personal attachment which makes deprivation of that land by, for example, repossession or eviction difficult to accept. This in turn can lead to bitter legal wranglings which land law must resolve. Uniqueness is also a price inflator.
5. **Land is socially and economically important:** Billions of pounds are loaned to individuals and businesses in the UK to purchase land. Land is one of several vital pillars supporting the British economy. Evidence of this is all around us; you need only think of the concerns in the media of a ‘housing bubble’,<sup>6</sup> of rising house prices, or of irresponsible

<sup>5</sup> In Chapter 2, we will explore how a system of land registration contributes to this goal.

<sup>6</sup> A housing bubble occurs where land prices rise inexorably and thus so do house prices in a manner that is unsustainable and ultimately the bubble bursts as prices decline.

mortgage lending to see that land is a key protagonist in the story of our economy's rise and fall. But land is also socially important. Land is much more than the sods of earth that comprise it: consider the purchase of a property as a home.<sup>7</sup> Socially, land gives us somewhere to live, somewhere to build a family, somewhere to be active citizens—it provides the blank canvas against which we shape our lives and our businesses.

6. **Land is capable of supporting multiple interests:** This is land's *pièce de résistance*, its show-piece, but also the source of most disputes over it. Land is able to sustain simultaneous, multiple uses and interests. Let's take an example: Armita buys a parcel of land but cannot afford the full asking price. She therefore takes out a mortgage loan. In return for the loan, the bank enjoys an interest in the land. Imagine that when Armita purchases the land she promises the neighbours that she will not run a business from the site. She gives another neighbour, Ben, the right to walk over her land and park his car, and, finally, she rents out part of her land to Cai who becomes her **tenant**. Armita, the bank, Ben, and Cai all have rights concerning the use of the land. The law allows for these rights to coexist simultaneously, maximizing the use-value of land. With multiple interests, however, come risks. Chief among them is what land lawyers call the 'enforceability' or 'priority question'. In other words, whose interest wins? Who takes priority when a dispute arises between these competing claims? It is this question of enforceability and priority between right holders that is the very essence of land law.

Land's special features mean that a body of rules has developed around it: this is land law.



Visit the online resources to watch the author introduce the topic of land law.

## 1.2 The scope of contemporary land law: What is land law?

English law draws a distinction between 'real' and 'personal' property. In its most straightforward sense, real property consists of land and personal property is all other property that is not land. Land law is the law concerning 'real property' or **realty** rather than personal property, or **personalty** as it is called. Birks explains the difference between real and personal property in the following passage:<sup>8</sup>

If a lay person hears 'real property' or 'real **estate**' or 'realty', what will come to mind will be an image of land. For most lawyers the effect will be the same . . . 'Personal property' or 'personalty' similarly evoke cars, cows, televisions, crockery, pictures, money and a host of other moveable things . . . A judgment in money can be called personal because it gives the victorious claimant no right in or to any particular thing but merely a right that a person, the defeated defendant, pay the sum in question . . . in some actions, you could recover the thing itself. Those actions came to be called 'real actions', 'real' meaning 'thing-related' in the simplest sense that the person claiming would recover the very thing claimed. The subject matter of real actions then became real property.

Land law is the law of real property. It is 'that part of the general law which governs the allocation of rights and responsibilities in relation to "real" or "immoveable" property'.<sup>9</sup>

<sup>7</sup> We consider in Chapter 6 what makes land a home and how you acquire an interest in it.

<sup>8</sup> P. Birks, 'Before We Begin: Five Keys to Land Law' in S. Bright and J. Dewar (eds), *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998), 470.

<sup>9</sup> K. Gray and S. F. Gray, *Elements of Land Law*, 5th edn (Oxford: Oxford University Press, 2008), 3.

As Birks explains, the word ‘real’ indicates that we are concerned with rights *in rem*, which is Latin for rights *in the thing*. The real/personal distinction is ancient and historically described the nature of the remedy available when legal proceedings were brought: an action *in rem* involved seeking recovery (i.e. return) of the land; for example, where the true owner had been dispossessed. In contrast, an action *in personam* consisted of an action against a wrongdoer personally, and for which the remedy would be compensation in the form of damages. Today, this real/personal distinction endures but represents largely a historical overhang from the early development of the law. Most of the rights we encounter in this book are regarded as real property as they would have been protected by actions *in rem*.

Land law is about rights in things; in other words, rights in the land rather than rights which are merely personal to the people who created them. But land law is also about responsibilities and, crucially, about relationships. Land does not exist in a vacuum and land law must also be regarded as the body of law governing the *relationship* between the thing and the owner of that thing. More specifically, land law creates a framework in which a variety of relationships between people and land can operate. Land law is concerned with the nature, creation, and protection of rights in land and also the content of those rights. If you rent a parcel of land, for example, what rights do you have? If the land is sold or disposed of without your consent, what forms of redress do you have? How can you protect your position?<sup>10</sup> These are all questions to which land law attempts to provide the answers.

### 1.3 What is land?

The traditional starting point is the definition of ‘land’ in s. 205(1)(ix) of the Law of Property Act 1925 (LPA 1925) which provides that:

‘Land’ includes land of any **tenure**, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other **corporeal hereditaments**; also a manor, an advowson, and a rent and other **incorporeal hereditaments**, and an **easement**, right, privilege, or benefit in, over, or derived from land.

Section 205 offers a rather confounding statutory definition but it serves a vital function. It tells us that land law is about more than just physical, tangible property such as trees and coal (so-called corporeal hereditaments): it also concerns intangible rights in land (so-called incorporeal hereditaments). These intangible rights are those which are not necessarily visible on the land but are extremely important, and include such rights as **leases**, easements, **covenants**, and mortgages.<sup>11</sup> Land, under s. 205, is defined as including both the physical aspects of land as well as those rights of enjoyment of land that cannot be seen. When we talk of ‘land’, what do we mean and what does ‘land’ include?

#### 1.3.1 The expansive meaning of ‘land’

Land enjoys an expansive meaning. At common law, the following 16th-century maxim (though very old) really sums up the breadth of interpretation given to land: *cuius est solum eius est usque ad coelum et ad inferos*—the owner of the soil also owns everything up

<sup>10</sup> These are issues concerning leasehold land which we cover in Chapter 9.

<sup>11</sup> All of which we consider later in this book in Chapters 9, 11, 12, and 13 respectively.

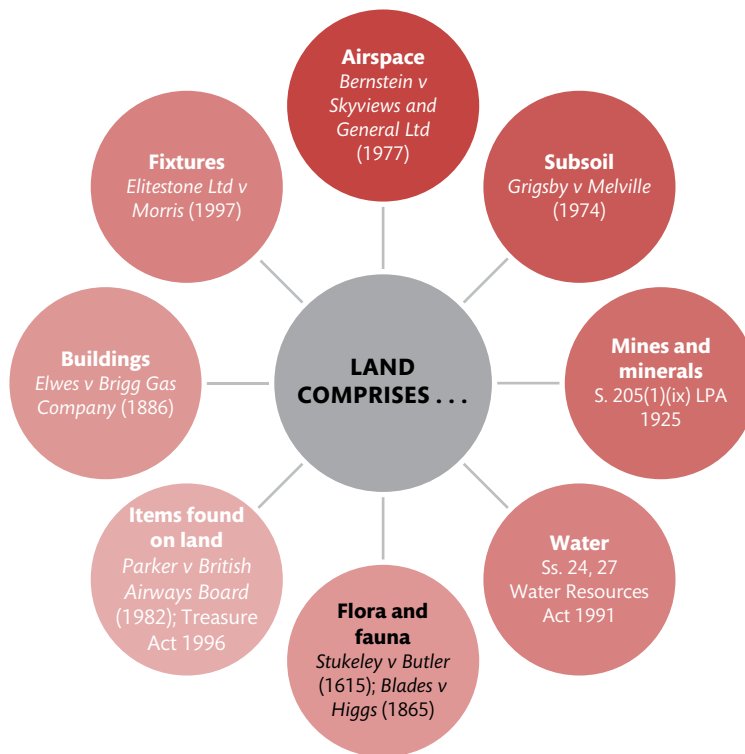
to the heavens and down to the depths of the earth. What this maxim tells us is that land involves much more than just rights to the surface level of the soil and can encapsulate rights both above and below the surface: see Figure 1.2. But just how far up and how far down do these rights extend?<sup>12</sup> As we will discover, the extent of these rights has been limited and qualified by both common law developments and statutory intervention.

### 1.3.1.1 Airspace

The 16th-century maxim cited earlier (often abbreviated to *cuius est solum*) does not and, in truth, has never fully reflected the full position as to ownership rights above the ground. Today, there are limits on how high your ownership rights reach—as, otherwise, every time a plane flew over your house, it would be a trespass! To understand the principles here, we must draw a distinction between so-called ‘lower stratum’ and ‘upper stratum’.

#### *The lower stratum*

A landowner enjoys ownership rights over the airspace immediately above their land. But what is ‘the lower stratum’—how far does it extend? As explained in the important case of *Bernstein v Skyviews and General Ltd* (1978), per Griffiths J: a landowner’s rights are restricted ‘to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it’.



**Figure 1.2** The expansive meaning of land

<sup>12</sup> For a fulsome analysis of the question, see K. Gray, ‘Property in Thin Air’ (1991) 50 CLJ 252.

**KEY CASE** *Bernstein of Leigh (Baron) v Skyviews & General Ltd (1979)*

**Facts:** Skyviews was a company that flew over people's houses, took photos, and offered them for sale to residents of the houses. Skyviews flew over Lord Bernstein's house in Leigh, Kent. Lord Bernstein objected, arguing this was an invasion of his privacy and amounted to a trespass into his airspace.

**Legal issue:** Had Lord Bernstein's rights to airspace been infringed?

**Judgment:** The court rejected Lord Bernstein's claim. It held that there had been no trespass and Lord Bernstein's **property rights** had not been infringed.

Griffiths J explained:

If the Latin *cuius est solum* were to be applied literally—it would lead to an absurdity; namely that any satellite passing over suburban gardens would amount to trespass. The way to strike the right balance was to instigate the following test: landowners only enjoy rights above their property 'to such height as is necessary for the ordinary use and enjoyment of the land'. Above this height, landowners enjoy no greater rights than any other member of the public including companies flying over taking photos.

Practically speaking, what does 'such height as is necessary for the ordinary use and enjoyment of land' mean? Well, it very much depends on the facts of the case and the court's assessment of all the circumstances. The following case law examples should give you a flavour of how the courts have interpreted the *Bernstein* test:

- *Lemmon v Webb (1894)*: Branches of a tree from one parcel of land were overhanging a neighbour's property. This amounted to an interference with the neighbour's airspace and it was therefore lawful for the neighbour to lop the branches to prevent the nuisance; provided this did not involve entering the other's land.
- *Gifford v Dent (1926)*: An advertising sign reached 4 ft 8 inches over the claimant's forecourt. This amounted to a trespass of the claimant's airspace.
- *Kelsen v Imperial Tobacco (1957)*: An advertising sign reached 8 inches into the airspace above the claimant's shop. This amounted to a trespass to the claimant's airspace and an **injunction** was granted requiring the sign be removed.
- *Laiqat v Majid (2005)*: An extractor fan extended across a neighbour's backyard and garden by just 750 mm. This amounted to a trespass.
- *Woolerton & Wilson v Richard Costain Ltd (1970)* and *Anchor Brewhouse Developments v Berkeley House (Docklands Developments) Ltd (1987)*: In both these cases, cranes standing on one parcel of land but oversailing (i.e. swinging across) neighbouring land amounted to a trespass and injunctions were granted to stop this.<sup>13</sup>

As these cases show, subject to the court's assessment, interference into your airspace may constitute trespass. Importantly, there can be an actionable trespass even if no damage or loss has been caused. This was confirmed in *Kelsen*, *Laiqat*, and in *Anchor Brewhouse Developments* where it was held to be immaterial that the signage, extractor fan, and crane in no way impacted the claimants' use of their respective land.

<sup>13</sup> See also the Australian case of *Graham v K. D. Morris & Sons Pty Ltd (1974)* and *Baten's Case (1610)* which concerned overhanging eaves of a neighbouring property.

### *The lower stratum and aeroplanes*

Advances in technology, and the invention of flight in particular, have completely transformed the concept of right to airspace. Today, aircraft routinely fly over urban and residential areas including at night. The relationship between the lower stratum and aeroplanes therefore warranted specific legislative intervention and is now governed largely by statute. By way of example:

- Section 76 of the Civil Aviation Act 1982 provides:

No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case is reasonable . . .

This section essentially prevents actions in nuisance and trespass against aircraft flying in compliance with relevant regulations.

- Section 3(5) of the Rules of the Air Regulations 2007 provides that, without specific permission of the Civil Aviation Authority, aircraft: (1) must not fly closer than 500 feet to any person, vessel, vehicle, or structure; and (2) must not fly, in a congested city or town area, below 1,000 feet above the highest fixed obstacle.

What role might human rights arguments play here? The European Court of Human Rights in *Hatton v UK* (2003) examined whether increased night flights over residential areas near Heathrow airport amounted to an interference with residents' Article 8 of the European Convention on Human Rights (ECHR) right to respect for private and family life. The Grand Chamber held there was no infringement of Article 8 but criticized heavily the narrow scope of judicial review available to the litigants and the lack of private law remedies. With anticipated, further increases in air travel and the debate encircling the construction of a third runway at Heathrow, *Hatton* is unlikely to be the last word on the subject but, for now, seems to close the door on human rights arguments.

### *The upper stratum*

The upper stratum refers to that portion of airspace above the lower stratum. We have just encountered, as established in *Bernstein*, that landowners' rights are limited to the lower stratum and only extend to 'to such height as is necessary for the ordinary use and enjoyment of the land'. Therefore, beyond this height a landowner has no rights to the airspace. As the court explained in the Canadian case of *Re the Queen in Right of Manitoba and Air Canada* (1978), this upper stratum is *res omnium communis* ('thing of the entire community' or 'common heritage of humankind'). On this basis, a claim by the province of Manitoba that sales of goods onboard aircraft flying over its airspace were subject to its taxation rules failed—the upper stratum is not subject to ownership by anyone.

#### 1.3.1.2 Subsoil

The owner of land will usually also own any man-made and natural space below the land which is actually capable of being owned. These subsurface spaces will normally be so owned even if they have been created by another party and even where the landowner is not in fact able to access them.<sup>14</sup>

<sup>14</sup> *Metropolitan Railway Co. v Fowler* (1893) (which involved a railway tunnel); *Grigsby v Melville* (1972) (which involved a cellar).



### 1.3.1.3 Mines and minerals

At common law, an owner of land is said to be entitled to ‘all mines and minerals’ within the land.<sup>15</sup> This was codified in s. 205(1)(ix) of the LPA 1925 (look back at the extract in section 1.3), but this position has been qualified by the court and by statute which have carved out certain exceptions. Any coal, natural gas, and oil beneath the land, for example, are deemed by statute to be property of the Crown.<sup>16</sup> The same is true of any unmined gold or silver found in mines on or under land.<sup>17</sup>

### 1.3.1.4 Water

The position as to water is rather technical. Water which passes over or flows through land cannot be owned. If you own land which is, in part, covered with water, you also do not own this water. There can be ownership only as to very small volumes of water for agricultural or domestic household purposes. If you wish to extract greater volumes of water, you need a licence granted by the National Rivers Authority.<sup>18</sup>

### 1.3.1.5 Flora and fauna—trees, plants, flowers, and wild animals

Land is taken to include all the trees, plants, hedges, and flowers growing, whether they have been cultivated by the landowner or have sprouted up and grown wild on the property.<sup>19</sup> Perhaps macabrely, the position for wild animals depends on whether they are alive or dead. When wild animals are alive, the landowner has only ‘qualified’ property rights over them. This gives the landowner the right to catch and kill the animals on her land. Once wild animals have been caught and killed, the animals become the absolute property of the landowner.<sup>20</sup>

### 1.3.1.6 Items found in or on land

As the saying goes: ‘finders keepers; losers weepers’ but, in land law, how do we determine who owns items that are found on land? Imagine you visit a friend’s house and you find a gold bracelet on their driveway. Can you claim ownership of the bracelet; would it belong to your friend who owns the land or perhaps it constitutes treasure belonging to the Crown? We call this the law of ‘finds’ or ‘finders’ and explore it in this section: see Figure 1.3 which offers a helpful way of approaching the issue of items found on land.

Where items are found on land, dispute may arise as to who can claim **title** to the object—i.e. who has the best claim to the find? There may be different people who come forward:

1. the true owner of the item;
2. the finder of the item;
3. the occupier or owner of the land on which the item was found;
4. an employee of the occupier or owner of the land on which the item was found.

<sup>15</sup> Note, however, the vibrant debate around changes to trespass law under the Infrastructure Act 2015 which, subject to conditions, permits fracking firms to drill under homes without prior permission.

<sup>16</sup> Coal Industry Act 1994, s. 9; Petroleum Act 1998, s. 2.

<sup>17</sup> *Case of Mines* (1567); *Attorney-General v Morgan* (1891).

<sup>18</sup> Water Resources Act 1991, ss. 24 and 27; s. 132(1) of the Land Registration Act 2002 confirms that “land” includes . . . (b) land covered with water’.

<sup>19</sup> *Stukeley v Butler* (1615).

<sup>20</sup> This has been confirmed for both wild animals such as game (*Blades v Higgs* (1865)) as well as fish (*Nicholls v Ely Beet Sugar Factory Ltd* (No. 2) (1936)); see also *Borwick Development Solutions Ltd v Clear Water Fisheries Ltd* (2020).

A series of principles have developed to address this type of dispute and, as you will see, much depends on the nature of the item and where it was found.

*Where an item is found and the true owner of the item can be located or comes forward*

If someone finds an item on land, they are under a duty to take reasonable steps to locate the true owner of the item. Generally, this means a duty to publicize and advertise that the item has been found and follow up on any responses to the advertisement. The true owner of a found item has a better claim to title of the object than anyone else so, if the true owner is located or comes forward, as owner of the item, their claim trumps that of the finder or occupier or owner of the land on which the item was found: *Moffat v Kazana* (1969). Unless and until it can be shown that the true owner has abandoned or lost the item, the true owner remains entitled to it. In *Moffat*, Mr Russell stored a biscuit tin containing bank notes in the attic of his house. Mr Russell died and the house was subsequently sold to a new owner. The new owner had maintenance works carried out on the house and the repairman found the box (the repairman was the 'finder'). The new owner argued it was entitled to the tin as it formed part of the house sale. The court held that Mr Russell's relatives were entitled to the tin and money. Mr Russell remained the true owner of the tin and notes; he had not abandoned them and they therefore passed to Mr Russell's relatives on his death. The tin had not passed automatically on the sale because the tin and notes were **chattels**.

If the true owner of the item cannot be located, we then move to consider who else might claim title to the item. A key distinction is whether the item was found embedded *in* the land or whether it was found *on* (i.e. on top of) the land.

*Where an item is found embedded in, submerged on, or attached to the land*

This is the scenario where a finder ventures onto another's land and finds an item 'in' (i.e. under or embedded in) the ground; for example by using a metal detector and digging up an item. In this situation, if an item is found embedded in, submerged on (i.e. under the ground), or attached to the land and the true owner of the property cannot be found, it is the landowner who will have a better claim to ownership of the object than the finder. This is so even where the landowner was unaware of the object's existence prior to its find. This was laid down by the court in *Elwes v Brigg Gas Company* (1886) and confirmed by the Court of Appeal in *Waverley Borough Council v Fletcher* (1995):

- *Elwes v Brigg Gas Company* (1886): A tenant of a leased property was given permission by the landlord to excavate the land. During the work, a large hole was dug 6 feet below the surface of the ground which revealed a prehistoric boat. The landlord (landowner) had no prior knowledge of the existence of the boat but the court held that, in the absence of identifying the true owner, the landowner was entitled to claim ownership and not the finder.
- *Waverley Borough Council v Fletcher* (1995): A metal-detector enthusiast found a gold brooch when digging 9 inches below the surface of a public park owned by Waverley Borough Council. The council argued that the brooch was its property as it had been found on land it owned and the true owner could not be identified. The Court of Appeal agreed confirming the approach in *Elwes*. The court drew a distinction between items found on or on top of land and those found in, submerged, or attached to land. Where items are found in or attached to land, the owner of the land has the better claim to title to the item than the finder. The brooch

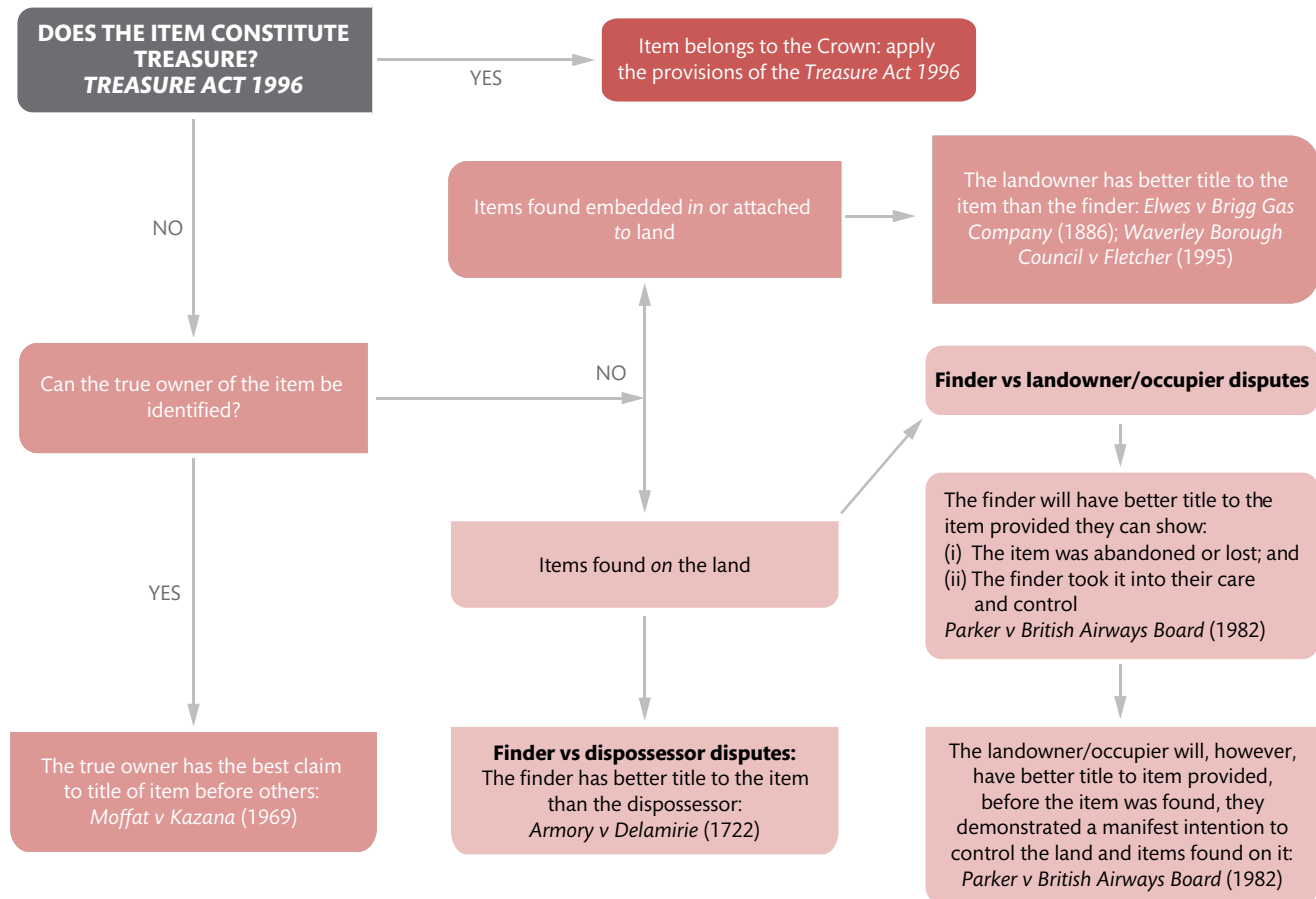


Figure 1.3 Items found in or on land

was submerged into the soil, had become part of the land; land that was owned by the council. The council enjoyed ownership of the brooch.<sup>21</sup> As Auld LJ explained in *Waverley*:

Where an article is found *in or attached to* the land, as between the owner or lawful possessor of the land and the finder of the article, the owner or lawful possessor of the land has the better title. [Emphasis added.]

*Where the item is found on the land (i.e. unattached on the surface of the ground)*

This is the scenario where a finder discovers an item on the land (i.e. on the surface) which is occupied or owned by another. In this situation, if an item is found unattached on top of land, and the true owner of the item cannot be identified, the starting point is that the finder will have the better claim to ownership of the object but only if they can show:

1. that the item has been abandoned or lost; and
2. the finder has taken the item into their care and control.

Even then, the occupier or owner of the land may still have a superior claim to the finder if it can demonstrate that, *before the item was found*, the occupier or owner had an intention to exercise control over the land and the things that may be found on it. These principles were laid down by Donaldson LJ in *Parker v British Airways Board* (1982).

### KEY CASE *Parker v British Airways Board* (1982)

**Facts:** An airline passenger, Mr Parker, found a gold bracelet on the floor in a British Airways (BA) executive lounge at Heathrow Airport Terminal One. BA were occupiers of the land. He handed the bracelet to BA staff and left his contact details so that it could be sent to him if no one came forward to claim the item. No one did come forward but, rather than contact Mr Parker, BA sold the bracelet for £850. Mr Parker claimed for the loss of value; arguing that, as the finder of the item and taking control of it, he had a property right in the item that was superior to BA.

**Legal issue:** Who owned the bracelet found by Mr Parker unattached on land occupied by BA in circumstances where the true owner could not be identified?

**Judgment:** The court allowed Mr Parker's claim and the Court of Appeal rejected BA's appeal.

Donaldson LJ held:

- A finder acquires no rights unless: (1) the item has been lost or abandoned; and (2) the finder takes the item into his care and control.
- If the item was lost or abandoned and taken into the finder's care and control, the finder has better title than the occupier/landowner unless the occupier/landowner can show that, before the item was found, it demonstrated a manifest intention to exercise control over the building and things found on it.
- Both the finder and the occupier's claims would, of course, fail if the true owner of the item came forward and could prove ownership. The true owner, if identified, would have the more superior title to the item.

On the facts, Mr Parker could show that the bracelet had been lost or abandoned, and was taken into his care and control. BA could show an intention to control who entered the executive lounge but could not demonstrate an intention, before the item was found, to exercise control over *lost property* found in the building in order to assert a superior claim. It appeared significant that while BA employees had been given instructions in a written document on what to do if lost items were handed to them, no details of any 'lost property policy' were publicized or published to users of the lounge and, moreover, BA did not carry out searches of the lounge for lost items.

<sup>21</sup> See also *South Staffordshire Water Co. v Sharman* (1896) where two rings were found in mud at the bottom of an old pond and held to belong not to the finder but to the landowner.

The case of *Parker* makes plain the finder will have the better claim unless the landowner or occupier can show, prior to the find, it demonstrated a manifest intention to exercise control over the land and anything found on it. Precisely what constitutes ‘control’ for this purpose is not entirely clear. Donaldson LJ gave some helpful examples:

If a bank manager saw fit to show me round a vault containing safe deposits and I found a gold bracelet on the floor, I should have no doubt that the bank had a better title than I, and the reason is the manifest intention to exercise a very high degree of control. At the other extreme is the park to which the public has unrestricted access during daylight hours. During those hours there is no manifest intention to exercise any such control. In between these extremes are the forecourts of petrol filling stations, unfenced front gardens of private houses, the public parts of shops and supermarkets as part of an almost infinite variety of land, premises and circumstances.

Had BA in *Parker* erected a sign reading, ‘Anything found in this lounge is the property of BA’, this may have sufficed to demonstrate the requisite ‘control’ over the land and items found for BA to assert ownership; but what about actions short of this and those other scenarios listed by Donaldson LJ in the extract above? This will be decided on a case-by-case basis taking into account all the facts of the case.

*Where the finder is employee of the occupier or owner of the land on which the item was found*

This is the scenario where an employee, in the course of their employment, finds an item and the true owner cannot be identified. In this situation, as Donaldson LJ explained in *Parker*:

Unless otherwise agreed, any servant or agent who finds a chattel in the course of his employment or agency and not wholly incidentally or collaterally thereto and who takes it into his care and control does so on behalf of his employer or principal who acquires a finder’s rights to the exclusion of those of the actual finder.

In other words, it is the employer (as principal) who enjoys a better claim to the item than the employee (as agent). This was the approach taken in the Irish case of *M’Dowell v Ulster Bank* (1899) where a bank porter found bank notes one evening when sweeping the bank floor. Palles CB held that the porter was acting in the course of his employment and merely as an extension of his employer when the money was found. The employer enjoyed better claim to the money than the porter. Donaldson LJ in *Parker* suggests the same is true for independent contractors who find items on land in the course of their provision of services; namely, the party engaging their services will enjoy a superior claim to the item.

The position may not always be as clear-cut, however, as Donaldson LJ and the case of *M’Dowell* suggest. There may be a dispute, for example, as to whether an item is found ‘in the course of employment’ and belongs to the employer or, alternatively, whether the employment was merely the occasion of the finding and so the item belongs to the finder. In *Byrne v Hoare* (1965), a police officer on special duty found a gold ingot on the floor next to the public exit from the theatre. The true owner could not be located. It was held that the officer was entitled to the ingot as he had not found it in his capacity as a police officer but in his personal capacity.<sup>22</sup> This raises the prospect of narrow, legal arguments as to the meaning of ‘course of employment’ but, certainly, the weight of case law leans predominantly in favour of the employer.

<sup>22</sup> *Byrne* can be contrasted with the Irish case of *Crinion v Minister for Justice* (1959) another ‘finds’ case involving a police officer but which reached the opposite conclusion.

*Where the finder is a trespasser on the land or has dishonest intent*

The Court of Appeal in *Waverley* explained that a trespassing finder will have no ownership rights in relation to an item discovered on land. In *Waverley* itself, the court noted that while Mr Fletcher had permission (a **licence**) to use the public park, he did not have permission to use a metal detector and dig up the ground in that park. Thus, he became a trespasser when excavating the soil and unearthing the brooch. Only where a find stems from the finder's lawful presence on the land will they be able to make a claim to ownership of the item discovered. Donaldson LJ echoed this view in *obiter* comments in *Parker* where he explained that a trespasser or a finder who acts with dishonest intent (e.g. purposely concealing the find or failing to seek the true owner) would not be permitted, under the rule of broad public policy, to benefit from their wrongdoing. Equally, a finder will be barred from claiming title to items found on land if the find springs from a dishonest or felonious act: *Hibbert v McKiernan* (1948). In this case, Mr Hibbert had stolen apparently 'lost' golf balls from a private golf course. He did not have permission to be on the course or to collect the balls. He was convicted of theft but argued, as 'finder' of the balls, he was entitled to them. The court disagreed. As a trespasser and a wrongdoer, he could not demonstrate a better claim to the balls than the landowner.

*Where an item is found but subsequently dispossessed by another*

This is the scenario where the finder discovers an item but hands it to, or the item is taken by, another person (the dispossessor) who, for example, then refuses to return it to the finder. Here, in any dispute between the finder and the dispossessor as to ownership, the finder will have a superior claim to the item above any dispossessor and can recover the item from the dispossessor if it is in their possession. The only person who will have a better claim to the item than the finder will be the true owner: *Armory v Delamirie* (1722).

In *Armory*, while cleaning a flue, a chimney sweeper's boy found a gemstone ring and took it to a goldsmith's shop to have it valued. The goldsmith looked at the item, took out the gemstone, and offered the boy a small amount of money for the ring. When the boy rejected the offer, the goldsmith refused to hand back the ring and gemstone. The goldsmith did agree to return the socket (ring minus the stone). The boy sued the goldsmith. The goldsmith argued the boy could not claim the ring as he was merely a dispossessor and not the true owner. The court held, 'the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner'. As the goldsmith could not prove a better title to the item than the boy, the boy succeeded in his action to recover the item.

*Where an item found on land amounts to treasure under the Treasure Act 1996*

Where items found on land constitute 'treasure', different rules operate to those discussed previously. In short, if an item comes within the definition of treasure, it will be the property of the Crown. So, how then is 'treasure' defined and what are the rules governing it? The relevant law is contained in the Treasure Act 1996 (TA 1996).<sup>23</sup> The Act was introduced to replace the old common law principles of 'treasure trove' which provided for only a very narrow definition of treasure and which, as a result, excluded often valuable items.<sup>24</sup> The central ambition

<sup>23</sup> For a discussion of the 1996 Act, see J. Marston and L. Ross, 'Treasure and Portable Antiquities in the 1990s Still Chained to the Ghosts of the Past: The Treasure Act 1996' [1997] Conv 273.

<sup>24</sup> The common law concept of treasure trove dated back to before the 12th century and provided that certain gold and silver objects discovered with no identifiable owner belonged to the Crown.

of the TA 1996 is to allow priceless antiquities and significant cultural objects to be preserved for national heritage and posterity. Let's delve into the key provisions of the TA 1996.

- **Section 1 of the TA 1996** provides the definition of 'treasure':

1.— (1) Treasure is:

- (a) any object at least 300 years old when found which:
  - (i) is not a coin but has metallic content of which at least 10 per cent by weight is precious metal;
  - (ii) when found, is one of at least two coins in the same find which are at least 300 years old at that time and have that percentage of precious metal; or
  - (iii) when found, is one of at least ten coins in the same find which are at least 300 years old at that time;
- (b) any object at least 200 years old when found which belongs to a class designated under section 2(1);
- (c) any object which would have been treasure trove if found before the commencement of section 4;
- (d) any object which, when found, is part of the same find as—
  - (i) an object within paragraph (a), (b) or (c) found at the same time or earlier; or
  - (ii) an object found earlier which would be within paragraph (a) or (b) if it had been found at the same time.

Section 1 can be a little fiddly when you first come to it. You need to read it carefully! So, when determining if an item found on land amounts to treasure, look closely to see if it falls within the subsections of s. 1.

In summary, 'treasure' includes:

- any object (other than a coin) at least 300 years old and at least 10 per cent precious metal by weight;
  - one of at least two coins in the same find, at least 300 years old and at least 10 per cent precious metal;
  - one of at least ten coins in the same find and at least 300 years old (note: no precious metal requirement here);
  - any object that would have been regarded as treasure trove under the old law but does not fall into the above categories under the 1996 Act; or
  - any object (whatever precious metal composition) found in the same place as or previously had been together with another object that is treasure.
- **Section 2 of the TA 1996** gives the Secretary of State the power to amend the meaning of 'treasure' so as to include any class of object considered of outstanding historical, archaeological, or cultural importance. Under s. 2, by way of the Treasure (Designation) Order 2002, the definition of treasure was supplemented to include prehistoric base-metal hoards (other than coins).
  - **Section 3 TA of the 1996** offers further detail to help us interpret the definition of treasure in s. 1:
    - the meaning of 'coin': it includes any metal token reasonably assumed to be used as or instead of money;
    - the meaning of 'precious metal': it means gold or silver;